TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 214.

THE NORTHERN PACIFIC RAILWAY COMPANY, APPELLANT,

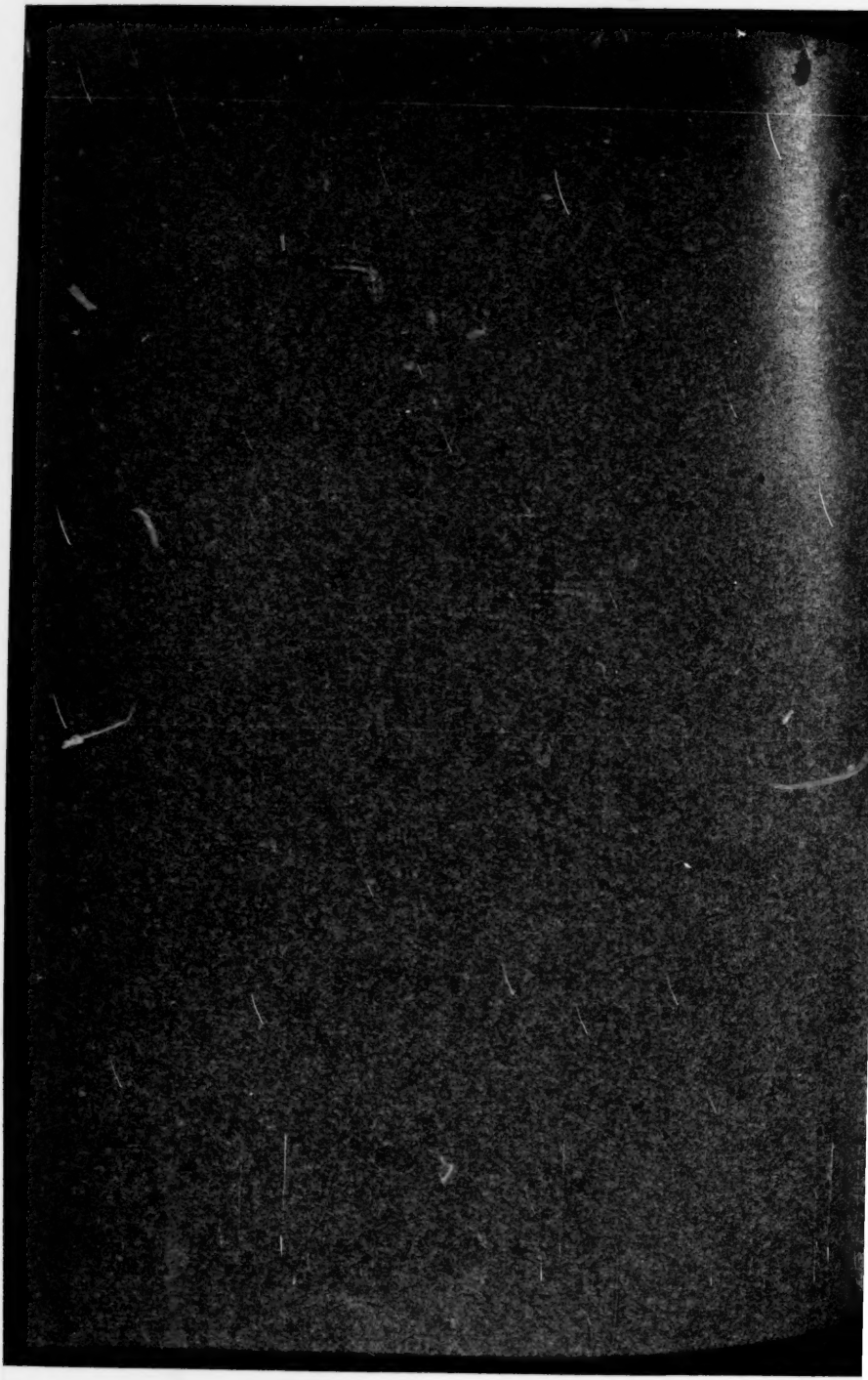
vs.

WILLIAM V. MYERS, TREASURER OF JEFFERSON COUNTY, MONTANA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED DECEMBER 30, 1897.

(16,755.)



(16,755.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 542.

THE NORTHERN PACIFIC RAILWAY COMPANY, APPELLANT,

vs.

WILLIAM V. MYERS, TREASURER OF JEFFERSON COUNTY, MONTANA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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1 In the United States Circuit Court of Appeals, Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
WILLIAM MYERS, Treasurer of Jefferson County, Montana, Defendant.

Stipulation as to Printing.

It is hereby mutually agreed by and between the parties above named, through their respective counsel, whose names are affixed to this agreement, that in the preparation of the record in said cause to be used upon the hearing in the circuit court of appeals that a certain tax-list set forth fully in two different occasions in the papers in said cause, and likewise set forth fully in the bill of complaint, should in said record, so prepared for said court of appeals, appear only once, and that in the other two instances, where said tax-list is set forth fully in the papers, said tax-list shall be omitted in
2 the preparation of said record, and a reference made in said record that the tax-list there to be inserted is the one already appearing at the place where it appears in said record.

F. M. DUDLEY AND
W. WALLACE, JR.,
Attorneys for Plaintiff.
C. B. NOLAN,
Attorney for Defendant.

(Endorsed:) Filed Feb. 18, 1897. F. D. Monckton, clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant,
vs.
WILLIAM V. MYERS, Treasurer of Jefferson County, Montana, Defendant.

Bill of Complaint.

Be it remembered that on the 8th day of March, 1895, the complainant herein filed its bill of complaint, which said bill of complaint is in the words and figures as follows, to wit:

3 To the judges of the United States circuit court for the district of Montana:

Thomas F. Oakes, a citizen of the State of New York, Henry C. Payne, a citizen of the State of Wisconsin, and Henry C. Rouse, a citizen of the State of New York, as receivers of the Northern Pacific Railroad Company, a corporation created, organized, and existing under an act of Congress of the United States, approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound

on the Pacific coast by the northern route," bring this their bill against (E. McSorley), William V. Myers, treasurer of Jefferson county, Montana, and a citizen of said State of Montana.

And thereupon your orators complain and say:

I.

That said Northern Pacific Railroad Company is a corporation created, organized, and existing under and by virtue of an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast, by the northern route," and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

That by the terms and provisions of said act said corporation as authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line,
4 with appurtenances, beginning at a point on Lake Superior in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as shall be determined by said company within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget sound, with a branch via the valley of the Columbia river, to a point at or near Portland in the State of Oregon.

By the third section of said act, lands were granted to said railroad company as follows: "That there be, and hereby is, granted to the Northern Pacific Railroad Company, 'its successors and assigns,' for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sec-ions per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary
5 of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. Provided, further, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, may be selected as above provided; and provided, fur-

ther, that the word 'mineral' when it occurs in this act shall not be held to include iron or coal."

By section 4 of said act it was further provided that whenever said company should have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States should appoint three commissioners to examine same; and if it should appear that such twenty-five consecutive miles of said road and telegraph line had been completed in a good, substantial, and workmanlike manner, as in all other respects required by said act, the commissioners should so report to the President of the United States; and patents of land as aforesaid should be issued to said company, confirming to said company all right and title to said lands situated opposite to and coterminous with said completed section of road, and that whenever, from time to time, twenty-five additional consecutive miles should have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents should be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road should be so completed.

6 II.

That the said railroad company duly accepted the terms, conditions, and impositions of said act, and signified such acceptance in writing under the corporate seal of said company duly executed pursuant to the direction of its board of directors first had and obtained; and within two years after the passage of said act, to wit, December 29, 1864, served such acceptance on the President of the United States.

III.

And your orators further show that thereafter, and prior to the year 1888, said railroad company definitely fixed the line of its said railroad extending from the waters of Lake Superior to a point on Puget sound, and prior to said year constructed, and caused to be constructed and put into operation, a continuous line of railroad and telegraph, extending from the waters of Lake Superior westerly across the State of Minnesota and the Territories of Dakota, Montana, Idaho, and Washington to the waters of Puget sound. That as fast as portions of said railroad and telegraph line equal to or exceeding twenty-five miles in length were so constructed as aforesaid they were examined by commissioners appointed by the President of the United States, and by said commissioners were found and reported to have been constructed in a good, substantial, and workmanlike manner, in all respects as required by said act of Congress. That such reports were duly accepted and approved by the Presi-
7 dent of the United States, as provided in said act of Congress of July 2, 1864.

That the portion of said railroad line extending from the last crossing of the Yellowstone river, at or near the western boundary

of the Crow Indian reserve, to the Little Blackfoot river, in the Territory (now State) of Montana, was definitely fixed prior to July 6, 1882, and on that day a plat thereof, duly approved by the Secretary of the Interior, was filed in the office of the Commissioner of the General Land Office. That the lands described in Schedule "A" hereunto annexed, which said schedule is here referred to and hereby made a part of this bill, *the* coterminous with said portion of said railroad line and within forty miles thereof.

That at the date of said grant to said railroad company, and at the time the line of said railroad coterminous with the lands described in Schedule "A" hereunto annexed was definitely fixed and the plat thereof filed in the office of the Commissioner of the General Land Office as aforesaid, said lands were lands not reserved, sold, granted, or otherwise appropriated; and there were at said times no filings or entries, or applications to make filing or entry, of any nature whatsoever upon or for said lands, or any thereof, in the United States district land office for the district in which said lands were situated, nor in the office of the Commissioner of the General Land Office; and said lands appeared on the records of said offices as free from pre-emption or other claims or rights. That said lands, and each and every part thereof, were, prior to
8 the attempted assessments and tax levies hereinafter referred to, surveyed by the United States or under its authority and were reported by the surveyors making such surveys to be agricultural lands and non-mineral in character, and as yet, so far as your orators have information, no minerals in quantities sufficient to add to the richness of said lands or to justify expenditures for their extraction by any methods of mining now in use, or invented, or known to exist, have been discovered in said lands.

That after the construction and approval of said railroad and telegraph line aforesaid, and long prior to said attempted assessments and tax levies, said railroad company prepared, in the form prescribed by the Secretary of the Interior, and filed with the register and receiver of the United States district land office for the district in which such lands were situate, lists of lands claimed by said company as inuring to it under its said grant by virtue of the construction and approval of said portions of said railroad, including among others the lands described in said Schedule "A" hereunto annexed; and at said time paid to the register and receiver of the United States district land office the fees to which they were, by reason of such listing and filing, entitled. That said lists were duly filed by said United States land officers, and were thereupon, in accordance with the rules of practice of the Interior Department, transmitted to the office of the Commissioner of General Land Office to be held until said lands should be examined and it could be ascertained and determined whether they were mineral or non-mineral lands, and were free from pre-emptions or other
9 claims or rights at the time the line of said railroad opposite thereto was definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office, and until all claims thereto adverse to said railroad company's claim should be

investigated and all contests decided. That thereupon the United States, as your orators are informed and believe, by its officers and agents in the Interior Department and in the General Land Office, began and have since proceeded with the examination of said lands and each and every tract thereof, to ascertain and determine whether said lands were or are mineral in character, or are for any reason excluded from the grant to said railroad company made by the act of Congress, approved July 2, 1864, and the supplemental acts and joint resolutions, and to hear contests arising upon claims to said lands asserted adversely to the claim of said Northern Pacific Railroad Company.

That as to the said lands described in Schedule "A" hereunto annexed, the said United States, by its officers and agents, was, at the time of the attempted assessments and tax levies herein referred to, and is now proceeding with the examination of said lands, and each and every tract thereof, and ascertaining and determining whether said lands are non-mineral, or are for any reason excluded from the grant to said railroad company made by said act of Congress of July 2, 1864, and said supplemental acts and joint resolutions of Congress; and are hearing the contests arising concerning the same, but the said officers have not yet determined the character of said lands as to whether the same are mineral or non-mineral.

10 And your orators further show and aver that after the said lists hereinbefore referred to were filed and transmitted to the office of the Commissioner of the General Land Office, as hereinbefore set forth, a claim to the lands described in said Schedule "A" hereunto annexed, and each and every part thereof, adverse to the claim of said railroad company was set up by the United States, and the claim of said railroad company thereto was questioned, denied, and contested. That said contest was pending at the time of said attempted assessments and tax levies hereinafter described, and is not finally determined, and is still pending. That such controversy and contest was and is over questions of fact. That at the time of said attempted assessments and tax levies said lands described in Schedule "A" had not been, and are not now, certified or patented to said railroad company, and the said lands were not ascertained or determined to be a part of the lands granted to said company, nor were they segregated from the public lands of the United States, and the said railroad company had and has but a potential interest therein.

That said railroad company has such right, title, interest, and property in and to said lands as was conferred upon it by said act of Congress approved July 2, 1864, and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof, and acquired by its compliance therewith as hereinbefore set forth. That at the time of said assessments and tax levies the United States had, and asserted as to all the lands described in the schedule here-

11 unto annexed, and still has and asserts, a potential claim thereto, because of the non-identification thereof as a part of the lands granted to said railroad company. That the United States Supreme Court has held and decided that until the patents

are issued therefor, the lands within odd-numbered sections within the limits of the Northern Pacific grant are "lands belonging to the United States," free and open to exploration for mineral deposits, within the provisions of chapter 6, title 32, of the Revised Statutes of the United States, and to appropriation, under the provisions of said chapter, upon the discovery of valuable mineral deposits therein. That because said lands were at the time of said attempted assessments and tax levies, not defined or identified as a part of the lands granted to said railroad company, and were not segregated from the public lands of the United States, and because said lands are not now so identified and defined and segregated, and because of the existence of the claims by the United States thereto adverse to the claim of said railroad company in and to said lands, as hereinbefore set forth, and of the contest thereover pending in the Interior Department, said lands were not, nor was any portion thereof, subject to assessment or to taxation for or during the year 1894.

IV.

And your orators further show that the delay in identifying and segregating from the public lands of the United States the lands granted by said act of July 2, 1864, to said railroad company, and in certifying and in patenting to said company the granted
12 lands, is not, as your orators are informed and believe, the result of any action, failure, or default on the part of said company or your orators, as the receivers thereof. That said railroad company and your orators, as the receivers thereof, as hereinafter described, have (since their appointment as such receivers) diligently and at all times endeavored to obtain the identification of, and to secure patents for, said lands; and have done everything in their means and power to obtain such identification, segregation, and issuance of patents, but such delay is solely because of the adverse claims to said lands as heretofore stated, and that the United States may have sufficient opportunity to examine and cause to be examined said lands, so that it may determine their mineral or non-mineral character, and whether they were free from pre-emption or other claims or rights at the time the line of said railroad coterminous therewith was definitely fixed and the plat thereof filed in the office of the Commissioner of the General Land Office as hereinbefore averred, and thus segregate from the public lands of the United States those lands which inured to said railroad company under said act, and that the United States may thus be enabled to collect the costs of surveying and conveying these lands which so inured under said grant, and to issue patents therefor to said company.

V.

And your orators further show that by an act of Congress approved on or about February 22, 1895, entitled "An act to
13 provide for the examination and classification of certain mineral lands in the States of Montana and Idaho," it is, among other things, provided that the Secretary of the Interior

shall, as speedily as practicable, cause the lands in certain land districts in said act named, in the States of Montana and Idaho, within the land-grant and indemnity land-grant limits of the Northern Pacific Railroad Company, as defined by said act of Congress approved July 2, 1864, and the acts supplemental thereto and amendatory thereof, to be examined and classified by commissioners to be appointed as in said act, provided, with special reference to the mineral or non-mineral character of such lands; and to reject, cancel, and disallow any and all claims or filings thereto if made, or which may thereafter be made, by or on behalf of said Northern Pacific Railroad Company, on any lands in said States which upon examination shall be classified, as provided in said act, as mineral lands. And it is further provided that for the purpose of making the examination therein provided for the President of the United States shall appoint three commissioners for each of the following land districts: The Bozeman, Helena, and Missoula land districts, in the State of Montana, and the Cœur d'Alene district in the State of Idaho. Said commissioners are to make examination of the lands within the limits of the grant to said Northern Pacific Railroad Company within their respective districts, and to classify said lands as mineral and agricultural lands. And it is provided in said act that all lands shall be classified as mineral lands which, by reason of valuable mineral deposits, are open to exploration, occupation,
and purchase under the provisions of the United States min-
14 ing laws. And it is further provided that where said lands
are surveyed the classification shall be by legal subdivisions; and where unsurveyed, by tracts of such extent and designated by such boundaries as the commissioners may determine. And it is further provided that the report of said commissioners upon the character of the lands examined and classified shall be filed with the register and receiver of the United States district land office for the district in which such lands are situated, and shall, unless such report be contested in the manner in said bill provided, be conclusive as to the character of said land; and as to all lands the classification of which is contested the final ruling shall determine the proper classification. And it is further in said act provided, that no patent or other evidence of title shall be issued or delivered to said Northern Pacific Railroad Company for any land in said States of Montana and Idaho until the examination and classification provided for in said bill should have been made; and that such patent or other evidence of title should only issue then to such land, if any, in said States, as such railroad company might be, by law and compliance therewith and by said classification, entitled to. And for a more ample statement of the provisions of said act your orators beg leave to refer thereto.

And your orators further show that all of the lands described in Schedule "A" hereunto annexed are within the Helena land district and within the provisions of said bill.

And your orators believe and aver that some portions of the
lands described in the schedule hereunto annexed will, when
15 examined and classified as provided for in said act of Con-

gress, be held and determined to be mineral lands, and excluded from the grant to said Northern Pacific Railroad Company, and that some of said lands will be held and determined to be agricultural lands, and to be within the grant to said company, but your orators do not know and cannot show unto your honors what specific lands will be so classified and determined to be mineral lands, and your orators further show that pending the classification of said lands as provided for in said bill your orators have refused, and are refusing, to sell or dispose of said lands or any thereof. That until such examination and classification is completed and made final your orators cannot ascertain or know what part of said lands are granted, and what part thereof are mineral lands and excluded from said grant to said Northern Pacific Railroad Company.

VI.

And your orators further show that the Farmers' Loan and Trust Company is a corporation created and organized under the laws of New York, and is a citizen and resident thereof.

VII.

And your orators further show that a joint resolution of Congress, approved May 31st, 1870, entitled "A resolution authorizing the Northern Pacific Railroad Company to issue bonds for the construction of its road and to secure the same by mortgage and
16 other purposes," authorized the said railroad company to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation.

That thereafter, to wit, November 20, 1883, the said railroad company, pursuant to the authority in said joint resolution, conferred, made, executed, and delivered its certain trust deed or mortgage known as the general second mortgage, wherein and whereby it conveyed to said Farmers' Loan and Trust Company of New York all and singular its railroad and telegraph line or lines then constructed, and being constructed, and to be constructed, from a point on Lake Superior, in the State of Wisconsin, to Tacoma on Puget sound, with the rights, privileges, immunities, and franchises connected with and related to said lines of railroad and line or lines of telegraph, and the construction, operation, and maintenance, use, and enjoyment thereof, and all corporate and other franchises of any nature related thereto, including the franchise of such railroad company to be a corporation; also all the lands granted by the Congress of the United States to aid in the construction and equipment of the entire of said main line and branch railroad; also all the indemnity lands, wherever the same shall be situated, that shall or may be acquired to supply deficiencies in the quantity of said granted lands, in pursuance of and in accordance with the
17 terms and provisions of said grant. That said trust deed or mortgage so made was made to secure certain bonds to be

issued by said company to an amount not exceeding twenty millions of dollars. That large amounts of said bonds were so issued, and there is now outstanding thereof $19,216,000.00.

That thereafter, to wit, December 1, 1887, the said Northern Pacific Railroad Company made its certain other mortgage, known as the general third mortgage, by which it conveyed by way of mortgage and in trust to said Farmers' Loan & Trust Company of New York all its railroad and telegraph lines, Cascade branch, land grant (including such indemnity lands as were then or might thereafter be acquired to supply deficiencies in the quantity of granted lands), property, equipment, and franchises, acquired and to be acquired for use in connection with its said railroads or its business, including its franchise to be a corporation, to secure the issue of its fifty-year six per cent. sinking fund gold bonds, to an amount not to exceed in the aggregate twelve million dollars. That of said mortgage bonds there have been issued and are now outstanding bonds to the aggregate amount of $11,461,000.

That thereafter, December 2, 1889, the Northern Pacific Railroad Company, made its certain other mortgage, known as its consolidated mortgage, by which it conveyed, by way of mortgage and in trust to said Farmers' Loan and Trust Company of New York, all its railroad and telegraph line, Cascade branch, land grant (including such indemnity lands as were then or might thereafter
18 be acquired to supply deficiencies in the quantity of granted land), property, equipment, and franchises acquired or thereafter to be acquired for use in connection with said railroad and its business, including its franchise to be a corporation, to secure the issue of its hundred-year five per cent. gold bonds, not to exceed in the aggregate one hundred and sixty million dollars. That of said bonds so secured there have been issued and are now outstanding bonds to the aggregate amount of $62,329,000.00.

VIII.

And your orators further show that in the year 1893 the said Northern Pacific Railroad Company was insolvent and unable to meet the interest upon its said bonds so issued and outstanding, and to pay its debts, and that August 16, 1893, P. B. Winston, a bondholder of said company, the Farmers' Loan and Trust Company, William C. Sheldon, George F. Sheldon, William S. P. Prentice, and William C. Sheldon, Jr., copartners doing business under the firm name and style of William C. Sheldon & Co., creditors of said company, filed their bill of complaint in this court, wherein, among other things, they prayed that receivers might be appointed of all the property of said Northern Pacific Railroad Company; and for a more complete and perfect statement of said bill of said action, your orators ask leave to refer to the record thereof in this court. That on the same day, on application of said complainant, said defendant, The Northern Pacific Railroad Company, thereto consenting, the said court then and there having jurisdiction, by an
19 order duly made appointed said Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse the receivers of said court of all

and singular the said defendant Northern Pacific Railroad Company, and of the lands, railroads, assets, and property of said company within the jurisdiction of said court; and authorized and directed said receivers to take possession of all and singular such property wherever situated or found, and to protect the title and possession of the same; and the said court then and there, by its said order, commanded and enjoined the officers, directors, and employees of said Northern Pacific Railroad Company, and all other persons or corporations soever, from interfering in any way with the possession and management of any part of the property over which the receivers were appointed, or interfering in any way with the discharge of their duties as such receivers. That a copy of said order is hereunto attached, marked Exhibit "B," and your orators beg leave to refer thereto for a full and correct statement of the contents of said order.

That thereafter, the said railroad company having made default in the payment of the interest upon its said bonds secured by the mortgages hereinbefore referred to, and having made default in the terms and conditions of said mortgages, said The Farmers' Loan and Trust Company, on the 30th day of October, 1893, commenced in said United States circuit court for the district of Montana, — division, by duly filing its bill of complaint therein and causing a subpœna to be issued and served upon the defendants, an action against the said Northern Pacific Railroad Company, Philip
20 B. Winston, and William C. Sheldon, G. R. Sheldon, William S. P. Prentice, and William C. Sheldon, Jr., copartners, doing business under the firm name and style of William C. Sheldon & Co., and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, for the foreclosure of said described mortgages. That by an order duly made and entered by said court on said day, said action was consolidated with said prior action; and your orators, the said Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, were appointed receivers of the said Northern Pacific Railroad Company, and of the property of said company, as in said order appointing them made in the court, August 16, 1893, with the right-, powers, and privileges in said order set forth; and their said receivership was extended to the said consolidated cause, and since continues. That after their appointment as such receivers, both in said original creditors' suit and in said foreclosure suit, your orators duly qualified and filed their bonds as required by the order of the court. And your orators beg leave to refer to the record in said creditors' suit and the said foreclosure suit, and to make the same a part of this bill of complaint.

IX.

And your orators further show that at the time of the appointment of your orators as such receivers, said defendant, Northern Pacific Railroad Company, claimed and had an interest under the said act of Congress approved July 2, 1864, and its acts taken in ac-

cordance therewith, as hereinbefore set forth, in and to the
21 lands described in the schedule hereunto annexed, which said interest was subject to the liens of the mortgages hereinbefore referred to. That your orators, under the orders and directions of this court, proceeded to take into their custody as such receivers all of the said described lands, and have since so retained the same.

That thereafter, to wit, —— —, 1893, your orators were by this court authorized and directed to proceed with the adjustment of the land grant to said railroad company, and to do any and all things by them deemed necessary to that end.

And your orators show that they have since their appointment as aforesaid, endeavored and are endeavoring, and taking all steps necessary to that end, to obtain the adjustment of said land grant to said company, and to obtain a final determination by the United States as to what lands claimed by your orators as inuring to said railroad company under the terms of said act do in fact so inure; and to have the granted lands defined and identified and segregated from the public lands of the United States; and to have patents therefor issued by the United States to said railroad company. That as yet your orators have not been able to obtain patents for those lands described in the schedule hereunto annexed which pass under said grant, because there is, as your orators are informed and believe, an adverse claim existing thereto, and because the United States have not yet examined said lands, or any thereof, or ascertained and determined whether or not said lands inure to said company under the terms of said act of July 2, 1864.

22 X.

And your orators further show that by an act approved July 15, 1870, the Congress of the United States enacted and provided as follows: "That before any land granted to the said company by the United States shall be conveyed to any party entitled thereto under any of the acts incorporating or relating to said company, there shall be first paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or party interested."

That prior to the assessment and tax levies hereinafter referred to the United States has paid out for the cost of surveying the lands described in the schedule hereunto annexed large sums of money, to wit, an average of four and one-half cents per acre for each and every acre included within the said described tracts. That no portion of the sum so paid out has ever been paid into the Treasury of the United States, nor has any part of the cost of conveying said lands to said railroad company been paid into the Treasury of the United States by said railroad company, or at all. That said railroad company was at all times ready to repay and refund such sums of money into the Treasury of the United States as soon as the lands granted by the United States to said company should be ascertained and determined, and the amount due for the surveying and

conveying thereof ascertained. That your orators, as the receivers of said Northern Pacific Railroad Company, are now ready and willing, and have been at all times since their appointment as such
23 receivers, so willing to pay into the Treasury of the United States all the costs of surveying and conveying the lands granted to said railroad company, and all other fees required by law to entitle said company to patents for said land. That the United States has not, nor does it now, withhold the patents for said lands because of the failure to pay such fees, but withholds said patents for said lands, as hereinbefore set forth, solely because the officers and agents of the United States have not yet ascertained and determined whether or not said lands were of the character of lands granted to said company, and because said lands were not ascertained and determined to be granted lands, and have not been segregated from the public lands of the United States, and because of the claims thereto adverse to the claim of said railroad company under said grant. That until it is ascertained and determined what lands are granted to said company by the United States under the act of July 2, 1864, and the acts and joint resolutions supplemental thereto, and amendatory thereof, the amount due from said railroad company to said United States for such costs cannot be ascertained or known.

That by an act approved July 10, 1886, the Congress of the United States enacted and provided, among other things, as follows:

"SEC. 1. That no lands granted to any railroad corporation by any act of Congress shall be exempt from taxation by States, Territories, and municipal corporations on account of the lien of the United States upon the same for the costs of surveying, selecting, and con-
24 veying the same, or because no patent has been issued therefor, but this provision shall not apply to lands unsurveyed; provided, that any such lands sold for taxes shall be taken by the purchaser subject to the lien for costs of surveying, selecting, and conveying, to be paid in such manner by the purchaser as the Secretary of the Interior may provide, and to all liens of the United States and all rights of the United States in respect to such lands; provided, further, that this act shall apply only to such lands situated opposite to and coterminous with completed portions of said roads and in organized counties; provided, further, that at any sale of lands under the provision of this act the United States may become a preferred purchaser, and in such case the lands sold shall be restored to the public domain and disposed of as provided by the laws relating thereto."

And your orators show that neither said Territory nor the State of Montana has ever made any provision whereby such lands may be sold for taxes, subject to the lien of the United States, for the costs of surveying, selecting, and conveying the lands, or to any lien or right of the United States whatever; but, on the contrary, the law of said State provides that a deed executed upon the sale of lands for taxes shall convey to the purchaser the absolute title. Nor has any provision been made by said State or Territory whereby at the sale of such railroad lands for taxes as permitted by said act

of Congress the United States may become a preferred purchaser; and such lands are not subject to the provisions of the revenue law of Montana.

25

XI.

Your orators further show that in the year 1894, the duly elected and qualified assessor of Jefferson county, Montana, claiming and pretending that said lands described in Schedule "A" hereunto annexed were subject to be taxed under the revenue law of said State of Montana, as the property of said Northern Pacific Railroad Company, proceeded to, and did, assess said lands at the true value of the fee thereof, and described and included said lands in the assessment book of said county for said year. That thereafter your orators, having been advised that said lands were so assessed, duly applied to the board of equalization of said county of Jefferson at its regular meeting on the — day of July, 1894, to have the assessment of said lands abated, because said lands were not subject to taxation by said county or the State of Montana; but your orators show that their said application was refused, said board of equalization wrongfully claiming and pretending said lands were subject to taxation as the property of said Northern Pacific Railroad Company.

And your orators further show that thereafter, to wit, on the second Monday of August, 1894, the board of county commissioners of Jefferson county fixed the rate of county taxes, and levied taxes upon the property in said county, including the lands described in Schedule "A." That thereafter the county clerk of said Jefferson county duly entered upon the assessment book of said county

26 the respective sums in dollars and cents to be paid as a tax upon the property therein enumerated, including the lands described in Schedule "A." That the taxes so entered in said book as levied upon (with other lands) the lands described in Schedule "A" hereunto annexed included the State, county, school, and other taxes. And on or before the first Monday of October, 1894, said county clerk delivered a copy of the said assessment-roll, corrected as required by law, to the county treasurer of said county, said copy being duly verified. That among other lands described in said duplicate assessment book were all of the lands described in Schedule "A" hereunto annexed.

And your orators further show that the taxes upon the lands described in Schedule "A" hereunto annexed remaining unpaid December 1, 1894, the said county treasurer added to the pretended taxes thereon, for the use of the county, a penalty of ten per cent. thereof, and your orators further show that said taxes attempted to be levied upon said lands described in Schedule "A" still remaining unpaid, the said defendant, E. McSorley, as treasurer of said Jefferson county, Montana, has advertised the lands described in Schedule "A" hereunto annexed for sale for said pretended delinquent taxes, and threatens and will, as your orators verily believe, so sell the same unless restrained by the order of this honorable court. And your orators further show that said treasurer is required by law to sell separately each description of land sold for taxes to the person

who will take the smallest portion thereof and pay the taxes and costs due, and to deliver to the purchaser at such sale a cer-
27 tificate of such sale. And your orators believe and so show that said defendant threatens and intends to so sell the lands described in Schedule "A" hereunto annexed, and that said lands if sold will be sold to many different purchasers, and some thereof will be sold to said county of Jefferson. That for each of such certicates of sale issued to purchasers an additional penalty of fifty cents will be charged. And your orators further show that said purchasers will, after the expiration of two years from the date of purchase, be entitled to receive deeds from such county treasurer for the lands so purchased. That such deeds are *prima facie* valid, and if not void convey to the purchaser the absolute title of the lands described therein, and if void, constitute a cloud upon the title.

And your orators further show that all of said taxes levied upon said lands described in Schedule "A" have, from and after the date of their levy, the effect of a judgment against the person; that they are a lien upon said lands, and have the force and effect of an execution duly levied against all personal property of the delinquent. That upon the sale of said lands for taxes as aforesaid said lien will vest in the purchaser, for the purchase price and twenty per cent. thereon, and two per cent. additional for each month that elapses from the date of such sale. And your orators show that said tax levies cloud the title to said described lands, and impair the value thereof as an asset in the hands of your orators; that said certifi-
cates and deeds when issued, as your orators believe and
28 show they will be, will constitute further clouds upon the title thereto. That if said lands be sold a multiplicity of suits will be necessary to quiet the title thereto and to remove the clouds thereby created. And your orators further show that they are not, as receivers of this court of said described lands, and ought not to be authorized to pay taxes upon unidentified and unclassified lands, and that they have not and cannot obtain money or funds for such purpose. That should any taxes be paid on said lands to said county, and suits be brought to recover the same, any judgment recovered would be paid in county warrants, and such warrants cannot, as your orators are informed and believe, be sold for their face value.

XIII.

That the amount of said taxes attempted to be levied upon said lands described in Schedule "A" hereunto annexed, and for which the said treasurer threatens and intends to sell said lands as hereinbefore set forth, is over ($3,000.00) three thousand dollars.

Forasmuch as your orators can have no adequate relief except in this court, and to the end that your orators may obtain the relief to which they are justly entitled in the premises, they now pray the court to grant them due process of subpœna, directed to said E. McSorley, treasurer of Jefferson county, Montana, the defendant hereinbefore named, requiring and commanding him to appear

herein and answer (but not under oath, an answer under oath being hereby expressly waived) the several allegations in this,
29 your orators', bill contained. And your orators further pray that upon the final hearing it be ordered, adjudged, and decreed as follows:

1. That the lands described in Schedule "A" hereunto annexed, and each and all thereof, were not subject to assessment and taxation by said county of Jefferson or State of Montana for the year 1894, and until the United States shall issue to said railroad company patents therefor.

2. That it may be ordered, adjudged, and decreed by said pretended and attempted assessments and tax levies were and are null and void, and constitute a cloud upon the title to said described lands.

3. That the said defendant, E. McSorley, treasurer of Jefferson county, Montana, his deputy and deputies, successor and successors in office, may be forever enjoined and restrained from selling or attempting to sell said described lands for the said pretended assessments and taxes attempted to be levied thereon for the year 1894, and from issuing, or causing to be issued, any certificate of sale for said described lands, or any thereof, or any deeds conveying or purporting to convey said lands, or any thereof, for or on account of said described taxes.

And your orators further pray that your honors may forthwith issue a preliminary restraining order, under the seal of this court, enjoining and restraining said county treasurer, his deputy and deputies, successor and successors in office, as hereinbefore prayed until the final determination of this cause..

30 For such other and further relief as may be equitable and just.

CULLEN & TOOLE,
F. M. DUDLEY,
Solicitors for Complainants.

STATE OF MONTANA, }
County of Lewis and Clarke, } ss:

F. M. Dudley, being first duly sworn, deposes and says that he is solicitor for the receivers of The Northern Pacific Company, the complainants in the above-entitled cause, that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true to his best knowledge and information, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true; that the reason why this verification is not made by said complainants, or some of them, is that neither of said complainants is now in the State of Minnesota, where affiant resides.

F. M. DUDLEY.

Subscribed and sworn to before me this 6 day of March, A. D. 1895.

W. E. CULLEN, JR.,
Notary Public, Lewis and Clarke County, Montana.

31 *Schedule of Lands*

(Said lands being in Jefferson county, Montana).

NOTE.—In this schedule N. stands for north, S. stands for south, E. stands for east, W. stands for west, N. E. stands for northeast, N. W. stands for northwest, S. E. stands for southeast, S. W. stands for southwest.

Subdivision of section.	Number of section.	Number of town. N.	Number of range. E.	Tax.
N. W. ¼ and lots 1, 2 and 5	5	1	1	
Lots 4 and 5	7	1	1	
All	1	2	1	
All	3	2	1	
All	5	2	1	
All	7	2	1	
All	9	2	1	
All	11	2	1	
All	15	2	1	
All	17	2	1	
All	19	2	1	
All	21	2	1	
N. ½ of N. W. ¼ of lots 6 and 7	27	2	1	
All	29	2	1	
All	31	2	1	
N. W. ¼ of N. W. ¼ and lots 2, 4, 5, and 8	33	2	1	
All	1	3	1	
All	3	3	1	
All	5	3	1	
All	7	3	1	
32 All	9	3	1	
All	11	3	1	
All	13	3	1	
All	15	3	1	
All	17	3	1	
All	19	3	1	
All	21	3	1	
All	23	3	1	
All	25	3	1	
All	27	3	1	
All	29	3	1	
All	31	3	1	
All	33	3	1	
All	35	3	1	
S. ½, S. ½ of N. W. ¼, S. W. ¼ of N. E. ½, and lots 2, 3, and 4	1	4	1	

Subdivision of section.	Number of section.	Number of town. N.	Number of range. E.	Tax.
All	9	4	1	
All	13	4	1	
All	15	4	1	
All	21	4	1	
All	23	4	1	
S. ½ of N. E. ¼, S. E. ¼, S. E. ¼ of S. W. ¼	25	4	1	
All	27	4	1	
S. ½ and N. W. ¼	29	4	1	
All	31	4	1	
All	33	4	1	
All	35	4	1	
33 All	1	5	1	
S. ½, N. E. ¼, N. ½ of N. W. ¼	3	5	1	
S. ½ and N. W. ¼	5	5	1	
N. ½ and E. ½ of S. E. ¼	5	5	1	
All	11	5	1	
All	13	5	1	
All	15	5	1	
W. ½, W. ½ of S. ¼, S. E. ¼ of S. E. ¼ and N. E. ¼ of N. E. ¼	21	5	1	
N. ½ and N. ½ of S. W. ¼	23	5	1	
N. W. ¼ and N. W. ¼ of N. E. ¼	27	5	1	
All	29	5	1	
All	31	5	1	
All	33	5	1	
S. W. ¼ of N. W. ¼ and N. W. ¼ of S. W. ¼ and lots 5 and 10	1	7	1	
N. E. ¼	11	7	1	
S. ½ of S. W. ¼ of N. E. ¼ (less 16 acres right of way)	13	7	1	
N. E. ¼ of N. E. ¼, W. ½ of N. E. ¼, N. W. ¼ of S. E. ¼ of lots 1, 2, 3	11	8	1	
N. W. ¼ of S. W. ¼ of lots 1 and 2	25	8	1	
W. ½ of W. ½	35	8	1	
Lot 12	5	9	1	
Lots 8 and 13	5	9	1	
Lots 8 and 9	9	9	1	
S. ½ of S. ½, N. W. ¼ of S. W. ¼ and S. W. ¼ of S. W. ¼	17	9	1	
34 N. ½ of N. W. ¼, S. E. ¼ of N. W. ¼ and N. E. ¼ of S. W. ¼	17	9	1	
N. ½ of S. ½, N. W. ¼ and W. ½ of N. E. ¼	21	9	1	
E. ½ of N. E. ¼	21	9	1	
S. W. ¼ and S. W. ¼ of S. E. ¼	27	9	1	

Subdivision of section.	Number of section.	Number of town. N.	Number of range. E.	Tax.
E. ½ of S. E. ¼, N. W. ¼ of S. E. ¼ and N. ½ of N. W. ¼	29	9	1	
S. ¼, S. ½ of S. W. ¼, S. W. ¼ of N. ¼, and E. ½ of N. ¼	31	9	1	
N. W. ¼ of N. E. ¼	31	9	1	
All	33	9	1	
Lots 4, 5, and 6	3	2	2	
All	5	2	2	
All	7	2	2	
N. W. ¼ of N. W. ¼ and lots 1 and 2	9	2	2	
Lots 3, 4, and 5	17	2	2	
Lots 4, 5, 8, and 9	1	3	2	
All	11	3	2	
W. ½ of S. W. ¼ and lots 2, 3, 4, 7 and 8	13	3	2	
All	21	3	2	
Fractional N. ½, N. ½ of S. E. ¼ and lots 3, 6 and 7	23	3	2	
W. ½ of W. ½ and lots 2, 3, 5, and 8	27	3	2	
All	33	3	2	
All	7	5	2	
Lots 2 and 6	9	5	2	
35 S. ½ of S. W. ¼ and lots 4, 5, 6	15	5	2	
W. ½ of S. W. ¼, S. E. ¼ of S. W. ¼, and S. W. ¼ of S. E. ¼, N. ½ of N. E. ¼, S. E. ¼ of N. E. ¼, and N. E. ¼ of S. E. ¼	21	5	2	
All	27	5	2	
N. ½	29	5	2	
N. ½ of N. E. ¼	31	5	2	
All	33	5	2	
N. W. ¼ of N. W. ¼, S. ½ of N. ½, S. ½ and lots 2, 3, and 4	35	5	2	
E. ½ of S. W. ¼ and lots 1, 2, 3, 4, 5, 6, 7, and 8.	7	6	2	
W. ½ of S. W. ¼, S. E. ¼ of S. W. ¼ and lots 4, 5, 6 and 9	17	6	2	
All	19	6	2	
Lot 3	21	6	2	
W. ½ and W. ½ of S. E. ¼	29	6	2	
Lot 3	27	6	2	
All	31	6	2	
Lots 2, 4, 5, 6, 7, 10, 11, 12, 13	19	7	2	
Lot 4	31	8	2	
		N.	W.	
All	1	1	1	
All	3	1	1	

Subdivision of section.	Number of section.	Number of town.	Number of range.	Tax.
		N.	W.	
All	5	1	1	
All	7	1	1	
All	9	1	1	
36 All	11	1	1	
All	13	1	1	
All	15	1	1	
All	17	1	1	
All	19	1	1	
All	21	1	1	
W. ½	27	1	1	
N. ½	29	1	1	
N. E. ¼ and N. ½ of N. W. ¼	33	1	1	
		N.	E.	
All	1	2	1	
All	3	2	1	
All	5	2	1	
All	7	2	1	
All	9	2	1	
All	11	2	1	
All	13	2	1	
All	15	2	1	
All	17	2	1	
All	19	2	1	
All	21	2	1	
N. ½, S. W. ¼, and N. ½ of S. E. ¼	23	2	1	
All	25	2	1	
All	27	2	1	
All	29	2	1	
All	31	2	1	
All	33	2	1	
37 All	35	2	1	
All	1	3	1	
All	5	3	1	
All	3	3	1	
All	7	3	1	
All	9	3	1	
All	11	3	1	
All	13	3	1	
All	15	3	1	
All	17	3	1	
All	19	3	1	
All	21	3	1	
All	23	3	1	
All	25	3	1	

Subdivision of section.	Number of section.	Number of town.	Number of range.	Tax.
		N.	E.	
All	27	3	1	
All	29	3	1	
All	31	3	1	
All	33	3	1	
All	35	3	1	
All	1	4	1	
All	3	4	1	
All	5	4	1	
All	7	4	1	
All	9	4	1	
		N.	W.	
All	11	4	1	
All	13	4	1	
38 All	15	4	1	
All except mineral surveys Nos. 3179, 3180, 3181, 3429, 3430, 3459	17	4	1	
All	19	4	1	
All	21	4	1	
All	23	4	1	
All	25	4	1	
All	27	4	1	
All	29	4	1	
All	31	4	1	
All	33	4	1	
All	35	4	1	
All (less 16.17 acres R. of W.)	1	8	1	
E. ½ and E. ½ of W. ½ and lot 4	3	8	1	
All	11	8	1	
N. ½	13	8	1	
N. E. ¼	15	8	1	
S. W. ¼ of S. W. ¼	5	9	1	
E. ½ of E. ½ of N. W. ¼	9	9	1	
S. W. ¼	15	9	1	
N. ½, S. E. ¼, E. ½ of S. W. ¼ (less 23 acres right of way)	21	9	1	
N. E. ¼ of S. W. ¼	23	9	1	
S. E. ¼	23	9	1	
N. E. ¼ and E. ½ of S. E. ¼, E. ½ of N. W. ¼ and N. ½ of S. W. ¼ (less 10 acres right of way)	27	9	1	
39 All	1	2	2	
All	3	2	2	
All	5	2	2	

Subdivision of section.	Number of section.	Number of town. N.	Number of range. W.	Tax.
E. ½, E. ½ of N. W. ¼ and S. W. ¼	7	2	2	
All	9	2	2	
All	11	2	2	
All	13	2	2	
All	15	2	2	
E. ½ of E. ½, W. ½ of N. E. ¼, E. ½ of N. W. ¼, N. W. ¼ of N. W. ¼, N. W. ¼ of S. E. ¼	17	2	2	
W. ½	19	2	2	
All	21	2	2	
All	23	2	2	
All	25	2	2	
All	27	2	2	
E. ½ and E. ½ of S. W. ¼	29	2	2	
S. ½, N. W. ¼ and S. W. ¼ of N. E. ¼	31	2	2	
All	33	2	2	
All	35	2	2	
N. E. ¼, E. ½ of S. E. ¼ and N. E. ¼ of N. W. ¼	1	3	2	
N. W. ¼ of N. E. ¼, N. W. ¼, N. W. ¼ of S. W. ¼	3	3	2	
E. ½ of S. E. ¼	5	3	2	
All	7	3	2	
All	9	3	2	
N. ½, N. ½ of S. W. ¼, S. W. ¼ of S. W. ¼ and S. E. ¼ of S. E. ¼	17	3	2	
40 All	19	3	2	
All	21	3	2	
E. ½, E. ½ of N. W. ¼, S. W. ¼ of N. W. ¼, S. W. ¼	25	3	2	
All	27	3	2	
E. ½, E. ½ of N. W. ¼ and S. W. ¼	29	3	2	
N. W. ¼ of N. E. ¼	31	3	2	
All	33	3	2	
All	35	3	2	
All	1	4	2	
All	3	4	2	
All	5	4	2	
All	7	4	2	
All	9	4	2	
All	11	4	2	
All	13	4	2	
All	15	4	2	
All	17	4	2	
N. ½, S. W. ¼ and W. ½ of S. E. ¼	21	4	2	
All	23	4	2	
All	25	4	2	
E. ½ and S. W. ¼	27	4	2	

Subdivision of section.	Number of section.	Number of town. N.	Number of range. W.	Tax.
N. W. ¼ (except mineral survey 2934)	27	4	2	
E. ½, N. W. ¼ and E. ½ of S. W. ¼	29	4	2	
W. ½ and S. E. ¼, S. E. ¼ of N. E. ¼ and W. ½ of N. E. ¼	31	4	2	
All	33	4	2	
41 All	35	4	2	
N. E. ¼ of N. E. ¼, W. ½ of N. E. ¼, N. W. ¼, W. ½ of S. W. ¼ and N. E. ¼ of S. W. ¼	1	1	3	
S. ½ of N. E. ¼ and N. ½ of S. E. ¼	5	1	3	
N. ½ of S. E. ¼, W. ½ of N. E. ¼ and N. ½ of S. W. ¼	9	1	3	
N. ½ of N. E. ¼	11	1	3	
All	1	2	3	
All	3	2	3	
Lot 1	5	2	3	
All	9	2	3	
All	11	2	3	
E. ½ of N. E. ¼, S. W. ¼ of N. E. ¼ and N. E. ¼ of N. W. ¼ (W. ½ of N. W. ¼), N. W. ¼ of S. W ¼ and S. E. ¼	13	2	3	
N. W. ¼ of N. E. ¼, S. E. ¼ of N. W. ¼, N. E. ¼ of S. W. ¼ and S. ½ of S. W. ¼	13	2	3	
All	15	2	3	
S. E. ¼ of N. E. ¼, S. W. ¼ of S. E. ¼ and E. ½ of S. E. ¼	17	2	3	
All	21	2	3	
W. ½ and S. W. ¼ of S. E. ¼	23	2	3	
S. E. ¼ of N. E. ¼, N. ½ of S. E. ¼ and S. E. ¼ of S. E. ¼	23	2	3	
All	25	2	3	
All	27	2	3	
N. ½	29	2	3	
42 S. W. ¼ and S. E. ¼ of N. W. ¼	31	2	3	
All	33	2	3	
N. ½, N. ½ of S. ½, S. W. ¼ of S. W. ¼ and S. E. ¼ of S. E. ¼	35	2	3	
All	1	3	3	
E. ½	3	3	3	
All	11	3	3	
All	13	3	3	
All	15	3	3	
All	21	3	3	
All	23	3	3	
All	25	3	3	

Subdivision of section.	Number of section.	Number of town. N.	Number of range. W.	Tax.
All	27	3	3	
All	33	3	3	
All	35	3	3	
N. ½ and S. E. ¼	1	4	3	
S. W. ¼	3	4	3	
All	5	4	3	
N. E. ¼ of N. E. ¼	7	4	3	
All	9	4	3	
All	15	4	3	
E. ½ of N. E. ¼	17	4	3	
All	23	4	3	
All	25	4	3	
All	27	4	3	
All	35	4	3	
All	1	5	3	
43 E. ½	3	5	3	
All	9	5	3	
All	11	5	3	
All	13	5	3	
E. ½ of N. E. ¼ and S. E. ¼	15	5	3	
W. ½ of N. E. ¼ (less 7 acres right of way)	15	5	3	
N. E. ¼ (less 6 acres right of way)	19	5	3	
All	23	5	3	
All	25	5	3	
S. W. ¼ of N. W. ¼ and W. ½ of S. W. ¼	29	5	3	
All	31	5	3	
All	5	7	3	
W. ½, W. ½ of S. E. ¼, S. E. ¼ of S. E. ¼ (less 15 acres right of way)	7	7	3	
S. ½ of N. W. ¼ and N. W. ¼ of S. W. ¼	17	7	3	
N. W. ¼ of N. E. ¼ and N. ½ of N. W. ¼ (less 20.60 acres right of way and B. C. lode)	17	7	3	
N. W. ¼ of N. E. ¼, N. W. ¼ and lot 3	19	7	3	
All	1	8	3	
E. ½ and E. ½ of N. W. ¼, N. ½ of S. W. ¼ and lots 5 and 6	3	8	3	
All	5	8	3	
N. ½, N. W. ¼ of S. W. ¼ and S. E. ¼	7	8	3	
E. ½ of S. W. ¼ and S. W. ¼ of S. W. ¼	7	8	3	
S. E. ¼ of S. E. ¼, S. W. ¼ of N. W. ¼, W. ½ of S. W. ¼, S. E. ¼ of S. W. ¼	9	8	3	

Subdivision of section.	Number of section.	Number of town.	Number of range.	Tax.
		N.	W.	
44 E. ½ of N. E. ¼, N. ½ of N. W. ¼ of N. E. ¼, N. ½ of S. ½ of N. W. ¼ of N. E. ¼, N. ½ of N. E. ¼ of N. W. ¼, N. ½ of S. ½ of N. E. ¼ of N. W. ¼, N. W. ¼ of N. W. ¼, W. ½ of S. E. ¼ of N. W. ¼, N. E. ¼ of S. W. ¼, N. E. ¼ of S. E. ¼, N. E. ¼ of N. W. ¼ of S. E. ¼, S. ½ of N. W. ¼ of S. E. ¼, S. W. ¼ of S. E. ¼	9	8	3	
All	11	8	3	
All	13	8	3	
E. ½ of E. ½, W. ½ of N. E. ¼, E. ½ of N. W. ¼, N. W. ¼ of N. W. ¼, N. W. ¼ of S. E. ¼, S. W. ¼ of S. W. ¼	15	8	3	
All	17	8	3	
All	19	8	3	
E. ½ and E. ½ of S. W. ¼	21	8	3	
S. ½, N. W. ¼, W. ½ of N. E. ¼ and S. ¼ of N. E. ¼.	23	8	3	
N. E. ¼ of N. E. ¼	23	8	3	
All	25	8	3	
All	27	8	3	
N. W. ¼, N. ½ of S. W. ¼, S. W. ¼ of S. W. ¼ and W. ½ of N. E. ¼	29	8	3	
S. E. ¼ of S. W. ¼, S. ½ of S. E. ¼ (less 12 acres right of way)	29	8	3	
N. E. ¼ of N. E. ¼, W. ½ of N. E. ¼ and W. ½.	31	8	3	
45 S. E. ¼ of N. E. ¼, N. ½ of S. E. ¼, S. W. ¼ of S. E. ¼, W. ½ of W. ½ of S. E. ¼ of S. E. ¼, E. ½ of S. E. ¼ of S. E. ¼ (less 12 acres right of way)				
All	33	8	3	
All	35	8	3	
		S.	W.	
Lot 3	7	1	4	
E. ½ of N. W. ¼	7	1	4	
		N.	W.	
All that part north of Jefferson river less 6 acres right of way	1	1	4	
E. ½ of N. W. ¼ (less 6 acres right of way)	3	1	4	
S. ½ of N. W. ¼ (less 12 acres right of way	3	1	4	
S. ½ of N. W. ¼, S. ½ and lot 3 (less 6 acres right of way)	5	1	4	
All	7	1	4	
N. E. ¼ of N. E. ¼ and E. ½ of S. E. ¼	9	1	4	
N. E. ¼ of N. W. ¼ and lots 1 and 2	19	1	4	

Subdivision of section.	Number of section.	Number of town. N.	Number of range. W.	Tax.
S. E. ¼ of N. W. ¼	19	1	4	
S. E. ¼	29	1	4	
W. ½ of N. E. ¼, W. ½ and lot 1	1	2	4	
All	3	2	4	
All	5	2	4	
All	7	2	4	
46 E. ½ of S. E. ¼ and S. W. ¼ of S. E. ¼	9	2	4	
All	11	2	4	
S. W. ¼ of N. E. ¼, W. ½ and S. E. ¼	13	2	4	
All	15	2	4	
N. ½ and S. W. ¼ and W. ½ of S. E. ¼	17	2	4	
All	19	2	4	
E. ½, E. ½ of N. W. ¼, S. W. ¼ of N. W. ¼	21	2	4	
All	23	2	4	
All	27	2	4	
All	29	2	4	
N. ½, N. ½ of S. ½, S. ½ of S. E. ¼ (less 10 acres right of way)	31	2	4	
W. ½ and W. ½ of N. E. ¼ and N. W. ¼ of S. E. ¼ and S. ½ of S. E. ¼	33	2	4	
E. ½ of N. E. ¼ and N. E. ¼ of S. E. ¼	33	2	4	
W. ½ and S. E. ¼	35	2	4	
All	3	3	4	
All	5	3	4	
E. ½, E. ½ of N. W. ¼, N. E. ¼ of S. W. ¼ and N. W. ¼ of N. W. ¼	7	3	4	
All	9	3	4	
All	15	3	4	
All	17	3	4	
S. E. ¼ of N. E. ¼, E. ½ of S. E. ¼, S. W. ¼ of S. E. ¼	19	3	4	
E. ½	21	3	4	
W. ½	27	3	4	
47 All	29	3	4	
E. ½, S. E. ¼ of N. W. ¼, E. ½ of S. W. ¼, S. W. ¼ of S. W. ¼	31	3	4	
E. ½, E. ½ of W. ½, S. W. ¼ of S. W. ¼	33	3	4	
S. W. ¼ of N. E. ¼, S. ½ of N. W. ¼, W. ½ of S. W. ¼ and lots 1, 2, and 3	3	4	4	
All	5	4	4	
E. ½, E. ½ of W. ½ and lots 1, 2, 3	7	4	4	
All	9	4	4	
S. W. ¼ of N. W. ¼, W. ½ of S. W. ¼, S. E. ¼ of S. W. ¼	15	4	4	

Subdivision of section.	Number of section.	Number of town.	Number of range.	Tax.
		N.	W.	
W. ½	17	4	4	
E. ½ of N. E. ¼ and E. ½ of S. E. ¼	17	4	4	
All	19	4	4	
All	21	4	4	
All	27	4	4	
All	29	4	4	
All	31	4	4	
N. E. ¼, W. ½ of N. W. ¼	33	4	4	
E. ½ of N. W. ¼, N. E. ¼ of S. W. ¼, N. W. ¼ of S. E. ¼	33	4	4	
S. W. ¼ of N. W. ¼, N. E. ¼ of S. W. ¼, N. W. ¼ of S. E. ¼	35	4	4	
E. ½ of S. E. ¼ and S. W. ¼ of S. E. ¼	3	5	4	
E. ½ of N. W. ¼, N. W. ¼ of N. W. ¼	13	5	4	
N. ½ and S. E. ¼ (less 6 acres right of way)	9	6	4	
48 All	11	6	4	
All	23	6	4	
S. ½ of N. W. ¼, S. ½ of S. E. ¼ and lots 1, 2, 3, and 4	1	7	4	
N. W. ¼, S. ½ of S. E. ¼, N. E. ¼ of S. E. ¼ and W. ½ of S. W. ¼	11	7	4	
N. ½ (less 8 acres right of way)	13	7	4	
		S.	W.	
E. ½, N. W. ¼, and E. ½ of S. W. ¼	1	1	5	
All	3	1	5	
All	5	1	5	
All that part north of Fish creek	9	1	5	
N. W. ¼ of N. E. ¼ and N. ½ of N. W. ¼	11	1	5	
		N.	W.	
All	1	1	5	
All	3	1	5	
E. ½	9	1	5	
All	11	1	5	
All	13	1	5	
All	15	1	5	
E. ½	17	1	5	
All	21	1	5	
All	23	1	5	
All	25	1	5	
All	27	1	5	
All	29	1	5	
E. ½	31	1	5	

	Subdivision of section.	Number of section.	Number of town.	Number of range.	Tax.
			N.	W.	
49	All	33	1	5	
	All	35	1	5	
	All	1	2	5	
	All	11	2	5	
	All	13	2	5	
	All	15	2	5	
	All	23	2	5	
	All	25	2	5	
	E. ½, N. ½ of N. W. ¼, and W. ½ of S. W. ¼ (less 20 acres right of way)	35	2	5	
	N. ½	1	4	7	
	S. ½	1	4	7	
	S. E. ¼ of S. E. ¼	11	4	7	
	All	13	4	7	
	E. ½	23	4	7	
	N. W. ¼ of N. W. ¼	25	4	7	
	W. ½	35	4	7	
	All	1	5	8	
	All	11	5	6	
	All	13	5	8	
	N. ½ of N. E. ¼	23	5	8	
	All	1	6	8	
	N. E. ¼ and E. ½ of S. E. ¼	11	6	8	
	All	13	6	8	
	E. ½ of N. E. ¼ and S. E. ¼	23	6	8	
	All	25	6	8	
	S. E. ¼	27	6	8	
	All	35	6	8	

50 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Montana. In Equity.

P. B. WINSTON, THE FARMERS' LOAN AND TRUST COMPANY OF the City of New York, a Corporation; William C. Sheldon, George R. Sheldon, William S. P. Prentice, and William C. Sheldon, Jr., Copartners, Doing Business as William C. Sheldon & Co., Complainants,

v.

NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Order Appointing Receivers.

Upon reading and considering the verified bill of complaint in this cause, together with the affidavits and exhibits presented in support thereof, and it appearing from said bill of complaint that a

similar bill has been filed in the circuit court of the seventh judicial circuit of the United States, for the eastern district of Wisconsin, and it appearing that said last-named court has appointed receivers in said action and it appearing that this is an ancillary proceeding, and that the receivers hereby appointed are ancillary re-
51 ceivers, and on motion of counsel for the complainants, the defendant, The Northern Pacific Railroad Company, appearing by counsel and assenting hereto, and due deliberation being thereon had, it is

Adjusted, ordered, and decreed by the court that Henry C. Payne, a resident of Milwaukee, in the State of Wisconsin, and Thomas F. Oakes, a resident of Mamaronech, Westchester county, State of New York and Henry C. Rouse, a resident of Cleveland, in the State of Ohio, be and they are hereby appointed receivers of this court of all and singular the said defendant, The Northern Pacific Railroad Company, and of all the lands, railroads, assets and property generally described in the bill of complaint herein, the same being the system of railways now in possession of and owned, operated, leased or controlled by the defendant, situated in the States of Michigan, Indiana, Illinois, Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington, and Oregon, and in the Dominion of Canada,, and all the property of the defendant, real, personal, and mixed of whatever kind and description and wheresoever situated, including all equipments, locomotives, cars and other rolling stock, boats, steamships, ships, docks, piers, floats, machinery, tools, material, shops, coal yards, and fixtures, coal on hand, and supplies now owned, held or in possession and use of the defendant and wheresoever situated, and including all tracks, terminal facilities, real estate, warehouses, offices, stations, and all other buildings of every kind owned, held, or possessed by the defendant, together with all telegraph lines and the appurtenances hereto; and also all moneys, books of account, contracts of every kind, debts, things in
52 action, bonds, stocks, securities, deeds, leases, leasehold interests, beneficial interests, muniments of title, bills receivable, rents, profits, and income of the premises accruing and to accrue, as well as all franchises, rights, easements, and privileges of the said Northern Pacific Railroad Company.

That the said receivers be and they are hereby fully authorized, empowered, and directed to take immediate possession of all and singular the property above described or referred to, wherever situated or found, and continue the operation of said railway system, and to run and operate the said railroad and such other railroads as the defendant corporation holds under lease or otherwise, and has heretofore run and operated, and to exercise the authority and franchises of the defendant, and conduct systematically the business and occupation of a common carrier of passengers and freight, and discharge all of the public duties obligatory upon the defendant or upon any of the other corporations whose lines of road are now in possession of and operated by the defendant; and to preserve the said property in proper condition and repair, so that it may with safety and most advantageously be used, and to protect

the title and possession of the same, and to employ such persons and make such payments and disbursements as may be needful or proper in so doing.

Each and every of the officers, directors, agents, and employees of the said Northern Pacific Railroad Company, and all other persons and corporations soever, are hereby required and commanded forthwith upon demand of the said receivers, or their duly authorized agent, to turn over and deliver to such receivers, or their
53 duly constituted representatives, any and all locomotives, cars, equipment, tools, machinery, boats, books of account, vouchers, papers, deeds, leases, contracts, bills, notes, bonds, certificates of stock, accounts, moneys, assets, or other property of any kind in his or their hand or under his or their control; and each and every of such directors, officers, agents, employees, persons, or corporations are hereby commanded and required to obey and conform to such orders as may be given them from time to time by the said receivers, or their duly constituted representatives, in conducting the operations of the said railroad system and property, and in discharging their duties as such receivers; and each and every of such officers, directors, and employees of the defendant, and all other persons and corporations soever, are hereby enjoined from interfering in any way whatever with the possession or management of any property *of the property* over which the receivers are hereby appointed, or interfering in any way to prevent the discharge of their duties as such receivers.

Said receivers are hereby fully authorized and empowered to operate the said system of railroads so owned, leased, or controlled by the said Northern Pacific Railroad Company, and manage all other property of such corporation at their discretion, in such manner as will in their judgment produce the most satisfactory results consistent with the discharge of the public duties imposed thereon, and to collect and receive all the income, tolls, and earnings therefrom, and all the debts due to defendant of all kinds; and
54 for such purpose are hereby vested with full power and authority at their discretion to employ and fix the compensation of all such officers, attorneys, managers, superintendents, agents, and employees as shall be necessary to aid them in the proper discharge of their duties.

Said receivers are fully authorized and empowered to institute and prosecute all such suits, actions, and proceedings as may be necessary in their judgment for the proper protection of the property and trusts hereby vested in them, and to likewise defend all such suits, actions, or proceedings instituted against them as such receivers, and also to appear in and conduct the prosecution or defense of any suit, actions, or proceedings now pending in any court or before any officer, department, or tribunal in which the said Northern Pacific Railroad Company is a party, the prosecution or defense of which will, in the judgment of such receivers, be necessary for the proper protection of the property placed in their charge, or for the interest and rights of creditors connected therewith.

And said receivers, and each of them, shall have power to redeem any and all of the securities of the company now pledged as security for loan of money, and they shall have power to borrow money, if necessary in their judgment, in order to comply with this direction, and also so far as may be necessary to pay for the current necessities for labor and supplies, but for no other purpose without the further order of this court. Said receivers are hereby directed to deposit the moneys coming into their hands in some bank of the cities of New York and St. Paul, and report to the court what banks they have so selected.

55 It is hereby further ordered, adjudged, and decreed, that out of the moneys that shall come into the hands of said receivers from the operation of said railroads and properties, they shall pay—

1st. All current expenses incident to the creation or administration of this trust, and to the operating of said railroads and properties;

2d. All sums due or to become due connecting or intersecting lines of railroads arising from the interchange of business, and for track service of other railroads used by said Northern Pacific Railroad Company in the operation of its lines, traffic, and car mileage balances, and all amounts now due from said Northern Pacific Railroad Company for taxes and assessments upon the property, or any part thereof;

3d. The amounts due to all operatives and employees, attorneys, and agents of said company for any service rendered to said company since the fifteenth day of February, A. D. 1893;

4th. All amounts due for supplies and material purchased and used in operating said railroads, or due by said company for supplies furnished to laborers and credited against their labor since the fifteenth day of February, A. D. 1893;

5th. All amounts due from said railroad company for or on account for the rental of rolling stock;

6th. With the sanction of the court, such amounts as may

56 be necessary for the purpose of protecting the real and personal property of said corporation from sale under leases, pledges, mortgages, or contracts.

And the money belonging to said railroad company not used as hereinbefore provided shall be held by said receivers until they are authorized to dispose of the same under the order or decree of this court.

It is further ordered that the said receivers shall retain possession and continue to discharge the duties and trust aforesaid until the further notice of this court in the premises, and that they shall from time to time make report of their doings in the premises and may from time to time apply to this court for such other and further order and direction as they may deem necessary and requisite to the due administration of said trust; and said receivers are vested, in addition to the powers aforesaid, with all the general powers of receivers in cases of this kind, subject to the supervision of this court.

Each of said receivers is hereby further required, within thirty days from the date of this order, to file with the clerk of this court a proper bond, with sureties to be approved by this court, in the penal sum of fifty thousand dollars, conditioned for the faithful discharge of his duties, and to account for all funds coming into his hands according to the order of this court.

And it is further ordered that said receivers shall keep account of all sums received and paid out by them on account of the said trust, and that the said receivers be and they are hereby
57 authorized to employ such agents, assistants, and counsel as may be necessary for the effectual discharge of their duties by this order conferred.

It is further ordered that an injunction be issued against the defendant and all persons claiming to act by, through, or under the defendant, and against all other persons, to restrain them from interfering with the receivers taking possession of and managing said property.

Dated at the city of Missoula, in said district of Montana, this 16th day of August, A. D. 1893.

HIRAM KNOWLES,
U. S. District Judge.

(Endorsed:) Title of court and cause. Bill of complaint. Filed March 8, 1895. Geo. W. Sproule, clerk.

And thereafter, on said 8th day of March, 1895, a subpœna in equity was duly issued in said cause, which said subpœna as filed is in the words and figures as follows, to wit:

58 UNITED STATES OF AMERICA:

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Montana. In Equity.

Subpœna ad Respondendum.

The President of the United States of America to E. McSorley, treasurer of Jefferson county, Montana, Greeting:

You are hereby commanded that you *and* appear in said circuit court of the United States aforesaid, at the court-room in Helena, on the first day of April, A. D. 1895, to answer a bill of complaint exhibited against you in said court by Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, a corporation organized and existing under and by virtue of an act of Congress of the United States of America, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty of five thousand dollars.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 8th day of March,
59 in the year of our Lord one thousand eight hundred and ninety-five, and of our Independence the 119th.

[SEAL.] GEO. W. SPROULE, *Clerk.*

Memorandum pursuant to rule 12, Supreme Court U. S.—You are hereby required to enter your appearance in the above suit, on or before the first Monday of April next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken *pro confesso*.

[SEAL.] GEO. W. SPROULE, *Clerk*.

UNITED STATES MARSHAL'S OFFICE, }
District of Montana. }

I hereby certify that I received the within writ on the 8th day of March, 1895, and personally served the same on the 9th day of March, 1895, by delivering to and leaving with E. McSorley, treasurer of Jefferson county, said defendant named therein, personally, at Boulder, county of Jefferson, in said district, an attached copy thereof, certified to by Geo. W. Sproule, clerk U. S. circuit court.

Helena, March 10, 1895.

WM. McDERMOTT,
U. S. Marshal,
By JOHN G. SIMPSON, *Deputy*.

(Endorsed:) Title of court and cause. Subpœna in equity. Filed March 11, 1895. Geo. W. Sproule, clerk.

60 And thereafter, to wit, on the 12th day of March, 1895, a stipulation to substitute William V. Myers as party defendant in place of E. M. McSorley was duly filed, which said stipulation as filed is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THOMAS F. OAKES, HENRY C. PAYNE, and HENRY C. ROUSE, Receivers of the Northern Pacific Railroad Company, Plaintiffs,
v.
WILLIAM V. MEYERS, Treasurer Jefferson County, Montana, Defendant.

Stipulation for Substitution.

The above-entitled action having been brought against E. M. McSorley, formerly treasurer of said Jefferson county, State of Montana, it is hereby stipulated by and between the parties to the above-entitled action that said action may be continued against his successors, the above-named William V. Meyers, and that the
61 name of said William V. Meyers may be substituted as defendant instead of that of E. M. McSorley.

F. M. DUDLEY,
CULLEN & TOOLE,
Attorneys for Plaintiff.
H. J. HASKELL,
Attorney for Defendant.

(Endorsed:) Title of court and cause. Stipulation. Filed March 12, 1895. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 15th day of March, 1895, the following restraining order was duly made and entered of record herein in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THOMAS F. OAKES, HENRY C. PAYNE, and HENRY C. ROUSE, Receivers for the Northern Pacific Railroad Company, Complainants,

v.

WILLIAM V. MEYERS, Treasurer of Jefferson County, Montana, Defendant.

62 *Restraining Order.*

Upon reading the duly verified bill of complaint herein, and after hearing counsel for the complainants and defendant, it is—

Ordered that the said defendant, William V. Meyers, as treasurer of Jefferson county, Montana, his deputy and deputies, successor and successors in office, be and each of them is hereby restrained and enjoined from selling or offering for sale, or attempting to sell, the lands described in the bill of complaint in the above-entitled action, or any thereof, for the taxes levied, or attempted to be levied thereon, by officers of said Jefferson county, for the year 1894.

This order to be continued in force until further order of the court in the premises.

Dated March 15, A. D. 1895.

HIRAM KNOWLES, *Judge.*

(Endorsed:) Title of court and cause. Order. Filed and entered March 15, 1895. Geo. W. Sproule, clerk.

63 And thereafter, to wit, on the 25th day of March, 1895, the demurrer of the defendant was duly filed herein, which said demurrer is in the words and figures as follows, to wit:

The Circuit Court of the United States, Ninth Circuit, for the State of Montana.

THOMAS F. OAKES, HENRY C. PAYNE, and HENRY C. ROUSE, Receivers of the Northern Pacific Railroad Company, Complainants,

v.

WILLIAM V. MEYERS, Treasurer of Jefferson County, Montana, Defendant.

Demurrer to Bill of Complaint.

The demurrer of William V. Meyers, defendant, to the bill of complaint of Thomas F. Oakes *et al.*, the above-named plaintiffs.

This defendant, by protestation, not confessing all or any of the matters and things in the said complainants' bill to be true in such manner and form as the same are herein set forth and alleged, doth demur thereto, and for causes of demurrer shows:

1. That it appeareth by the plaintiffs' own showing by said
64 bill that the complainants have not, in and by said bill, made or stated such a cause as does or should entitle them to any such discovery or relief as is thereby sought and prayed for, from or against this defendant.

2. That it appears by the said claimants' bill of complaint that the United States therein named is a necessary party to said bill, inasmuch as it is therein stated that the United States by its officers and agents was at the time of the assessment and levy of the taxes referred to in the bill of complaint, and is now, proceeding with the examination of said lands, for the purpose of ascertaining whether the same are excluded from the grant to the Northern Pacific Railroad Company by the act of Congress, July 2, 1864. And further, that the United States, through its officers, have set up a claim to each and every part of the lands thereof adverse to the claim of the Northern Pacific Railroad Company, and that a contest over said claim was pending at the time of the assessment and levy of the taxes.

And it further appears that the "Farmers' Loan and Trust Company," a corporation created and organized under the law of New York, and a citizen and resident thereof, is a necessary party to said bill of complaint, inasmuch as it is therein stated that the said "Farmers' Loan and Trust Company" on the — day of November, 1893, commenced an action in the United States circuit court, in the district of Montana against the Northern Pacific Railroad Company and certain other persons, for the foreclosure of the mortgage described in the plaintiffs' bill of complaint, and that the lands in question are subject to the lien of the mortgage which the
65 "Farmers' Loan and Trust Company" are now seeking to foreclose, and that it appears by the said bill that the said "Farmers' Loan and Trust Company," as mortgagee as aforesaid, and the United States are necessary parties plaintiff to the said bill

but that the United States and the said "Farmers' Loan and Trust Company" are not made parties thereto.

Wherefore, and for divers and other good causes of demurrer, and other errors and imperfections appearing in said bill, this defendant doth demur thereto. And he prays the judgment of this honorable court whether he shall be compelled to make any answer to the said bill; and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

H. J. HASKELL,
Attorney General, Solicitor for Defendant.
ELLA J. KNOWLES,
Ass't Att'y General, of Counsel.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

H. J. HASKELL,
Solicitor for Defendant.

66 STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

H. J. Haskell, being duly sworn, deposes and says that the defendant in this case is the county treasurer of the county of Jefferson, and does not reside within the county in which this affiant resides, and by reason of his official position is unable to leave the county of Jefferson, and for that reason this affiant makes oath to the foregoing; that the said H. J. Haskell is the duly authorized attorney under the laws of this State to appear for and on behalf of this said defendant, and that the foregoing demurrer is interposed in good faith and not for delay.

H. J. HASKELL.

Subscribed and sworn to before me this 23 day of March, A. D. 1895.

L. ROTWITT,
Sec'y of State.

(Endorsed:) Title of court and cause. Demurrer. Filed March 25, 1895. Geo. W. Sproule, clerk.

67 And thereafter, to wit, on the 13th day of May, 1895, a stipulation as to amendments to bill of complaint was filed, which said stipulation is in the words and figures as follows, to wit:

United States Circuit Court for the District of Montana.

THOMAS F. OAKES, HENRY C. PAYNE, and HENRY C. ROUSE, as Receivers of the Northern Pacific Railroad Company, Complainants,

vs.

WILLIAM V. MEYERS, Treasurer of Jefferson County, Montana, Defendant.

Stipulation as to Amendments to Bill.

It is hereby stipulated by and between the parties hereto that the bill of complaint herein may be amended as follows:

By inserting at the end of the sixth line from the bottom of page three the words: "And within forty miles thereof."

By inserting after the word "yet," in the fourteenth line from the top of page four, the words: "So far as your orators have information."

68 By inserting at the end of the third line from the bottom of page five the words: "But the said officers have not yet determined the character of said lands, as to whether the same are mineral or non-mineral."

By inserting at the close of paragraph five of said bill the following words, to wit:

"And your orators believe and aver that some portions of the lands described in the schedule hereunto annexed will, when examined and classified, as provided for in said act of Congress, be held and determined to be mineral lands, and excluded from the grant to said Northern Pacific Railroad Company, and that some of said lands will be held and determined to be agricultural lands, and to be within the grant to said company. But your orators do not know, and cannot show unto your honors, what specific lands will be so classified and determined to be mineral lands; and your orators further show that pending the classification of said lands, as provided for in said bill your orators have refused, and are refusing, to sell or dispose of said lands or any thereof; that until such examination and classification is completed and made final, your orators cannot ascertain or know what part of said lands are granted, and what part thereof are mineral lands and excluded from said grant to said Northern Pacific Railroad Company."

69 That paragraph XII of said bill shall be stricken out.

JOHN C. SPOONER,
F. M. DUDLEY,
Counsel for Complainants.

H. J. HASKELL,
E. L. KNOWLES,
Counsel for Defendant.

(Endorsed:) Title of court and cause. Stipulation. Filed May 13, 1895. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 13th day of May, 1895, the following proceedings were had and entered of record herein in the words and figures as follows, to wit:

In Open Court, April Term, A. D. 1895.

Present: Honorable Jas. H. Beatty, U. S. dist. judge, district of Idaho.

MONDAY, *May* 13, 1895.

NORTHERN PACIFIC RAILROAD COMPANY
vs.
WILLIAM V. MYERS, Treasurer of Jefferson County, Montana. } No. 365.

70 *Order Setting Time for Trial, etc.*

Complainant allowed to make amendments to bill of complaint as by stipulation agreed.

By agreement of respective parties cause ordered set for hearing on demurrer, and argument to be had at Moscow, in the State and district of Idaho, before Hon. Jas. H. Beatty.

And thereafter, to wit, on the 22d day of June, 1895, the opinion of Hon. James H. Beatty, U. S. district judge for the district of Idaho, before whom said cause was heard, was filed herein, which said opinion is in the words and figures as follows, to wit:

United States Circuit Court for the District of Montana.

THOMAS F. OAKES *et al.*, Complainants,
vs.
WILLIAM V. MYERS, Treasurer of Jefferson County, Montana, Defendant.

Opinion.

John C. Spooner and F. M. Dudley, counsel for complainants.

71 H. J. Haskell, att'y gen'l of Montana, counsel for defendant.

The complainants, as receivers of the Northern Pacific Railroad Company, by this action ask to enjoin the collection of taxes levied by the State of Montana, and in their complaint allege the grant, by act of Congress of July 2, 1864, to aid in the construction of the Northern Pacific railroad, of the odd sections of land within the place limits of the grant; that the company has in all respects performed all the acts devolving upon it; that it desires its patent for the lands in question, and has made its demand upon the Government therefor, but has been refused the same, for the reason that no mineral lands are included in the grant; that some of the lands in such odd sections may be mineral; that the Government is investigating the facts and will not issue its patent until it shall have

determined them; that the company cannot now know or designate the lands it will finally procure title to; that in this condition of the title the defendant or the authorized officer and agent of the defendant county has assessed against said company taxes on all the lands in said odd sections, regardless of the fact of their mineral or non-mineral character, and is proceeding to sell them for non-payment of such taxes, and that such taxation and sale of the lands would cloud the title thereto. Upon the complaint, Judge Knowles, of this district, issued a temporary restraining order against such threatened sale, and to the complaint the defendant demurs,
72 assigning as causes: 1st. That the complaint does not state such a cause of action as entitles complainants to the relief prayed; and 2d. Non-joinder of necessary parties. The first, being the only ground argued or relied upon, will alone be considered.

Preliminary to the main question is raised another—that all the lands to which the railroad company may have any claim or title, being in the hands of the receivers of this court in *custodia legis*, and cannot, without the consent of the court, be sequestrated by any other authority. That property under the direct control of a court can be reached only through the authority of such court has been the law so long that it is fundamental. That the same rule governs when the claim against the property is for taxes is fully declared by the Supreme Court *In re* Tyler, 149 U. S., 164–181, and cases therein cited. It results that the defendant should have had the consent of this court before proceeding against such lands, and any attempt to seize or sell them without such consent may be restrained.

The important question is, whether any of the lands in question are now subject to State taxation.

It will be conceded by all that lands belonging to the Government cannot be so taxed, but can be, when the legal or equitable title shall have passed from the Government to some other party, and certainly it must follow that no one can be taxed therefor until such title shall be in him.

In whom, therefore, does the title to these lands now rest?
73 In reply to that, much has been said of the holdings of courts that the grant was one *in præsenti*. This only means that the grant would become of effect at the date of the act, after the conditions attached should be fully complied with. It was by no means an absolute grant of all the land in each odd section within the place limits, for there were excepted from its operation all rights existing, under any law of the United States, prior to the "time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office," and all mineral lands. By many decisions it has been held, under the act in question and other similar acts, that as soon as the donee complied with the conditions of the act the equitable title, at least of all the odd sections, except those portions thereof to which prior rights had attached, passed to him, without any reference to the mineral lands or exceptions, but it must be observed that many of such decisions were concerning lands in those jurisdictions where

no mineral existed, and the mineral exception in the statute was not considered. By another line of authorities it was held that mineral lands not actually known to be such at the time the grant became operative passed with the other lands to the donee. Such was the view held by that able jurist, the late circuit judge of this circuit, in Northern Pacific R. R. Co. *v.* Barden *et al.*, 46 Fed. Rep., 592, and such was the generally recognized rule until the reversal of that case by the Supreme Court in 154 U. S., 288. Undoubtedly, under such construction of the act, the complainants would have an equitable title to these lands, and they would be subject to taxation, but this recent decision has overturned that construction;
74 has it not also overturned, or at least put in abeyance, complainants' title to all these lands and placed them beyond the reach of State taxation? The court in substance says in the Barden case that no title to any mineral lands, whether known or unknown, or mineral, passes until a patent shall issue; that it is the duty of the Land Department to investigate the facts and to withhold patent to all it shall conclude are mineral. The conclusive effect of this decision is, that the complainants have now no title to any of these lands; they have no actual control over or use of any; they cannot sell or give title to any, and whatever right or claim they may have is now so fully suspended that they cannot allege any present title. Beyond question to some of them they will procure title, but to which they do not now know. Some of them are so clearly non-mineral that none can doubt their character, yet it is not complainants' right to determine or act upon that, but prior to the act of Congress of February 26, 1895, it was alone for the department to determine.

The Supreme Court has held that before lands can be taxed the equitable title must have so far passed to the party that nothing more remains to be done but the mere formal act of issuing the patent to him, and, as held in Wisconsin R. R. Co. *v.* Price County, 133 U. S., 496–505, the lands alienated must be distinctly defined; the donee must have the right to the lands, and not be excluded from their enjoyment. This was a case in which the State undertook to tax lands within the indemnity limits claimed by the railroad company in lieu of lands within the place limits which had been otherwise disposed of.
75 The lands were in an agricultural country, where the mineral exception in the law was not in question. The court held that all lands in the odd sections within the place limits not previously granted belonged to the railroad company, and could be taxed, but that as to those claimed within the indemnity limits no title passed until the selections made by the railroad had been approved by the Secretary of the Interior; that although the company had done all required of it, and was demanding its patents, the Secretary had refused to grant them; that his duties requiring him to investigate certain facts were judicial, and not merely ministerial, and that until he did determine and act, the lands remained the property of the United States; that while the Government had made its promise to convey the lieu lands, yet such promise passed no

title or created any legal interest until the Department of the Interior had performed the required acts, and it concluded that none of the lands claimed by the railroad company within the indemnity limits were subject to taxation. The facts of that case make the principle therein announced applicable to the facts in this case. Here, the mineral lands are excepted from the grant; the railroad has claimed all the lands within the odd sections, has done all by the law required to until it passed to patents which it has demanded and which the Government has denied, for the reason that some of the lands claimed may be mineral, and says it must first investigate the facts, and that when it shall determine which of the lands are non-mineral it will issue its patent accordingly. This is a judicial question also, and until it is determined the complainants
76 will have no title of any kind to any of the lands in controversy, which must lead us to the conclusion that none of them can now be subject to taxation.

If, however, the decision in the Barden case leaves any doubt that all title of the railroad company is so in abeyance that it can exercise no control over or make any use or absolute disposition of any of these lands, it is entirely removed by the late act of Congress approved February 26th, 1895, by which it is provided that the Secretary of the Interior shall "cause all lands within the land districts hereinafter named (within which lie these lands) in the States of Montana and Idaho, and within the land-grant and indemnity land-grant limits of the Northern Pacific Railroad Company * * * to be examined and classified, * * * with special reference to the mineral or non-mineral character of such lands, and to reject, cancel, and disallow any and all claim or filings heretofore made, or which may hereafter be made by or on behalf of said Northern Pacific Railroad Company on any lands in said land districts; * * * and provided further, that the examination and classification of lands hereby authorized shall be made without reference or regard to any previous examination or report or classification thereof. That no patent or other evidence of title shall be issued or delivered to said Northern Pacific Railroad Company for any lands in said land districts until such lands shall have been examined and classified as non-mineral, as provided for in this act, and such patent or other evidence of title shall only issue then to such land, if any, in said land district as said company may be, by law
77 and compliance therewith and by said classification, entitled to, and any patent, certificate, or record of selection, or other evidence of title or right to possession of any land in said land districts, issued, entered, or delivered to said Northern Pacific Railroad Company in violation of the provisions of this act shall be void; provided, that nothing contained in this act shall be taken or construed as recognizing or confirming any grant of land or the right to any land in the said Northern Pacific Railroad Company, or as waiving or in anywise affecting any right on the part of the United States against said Northern Pacific Railroad Company to claim a forfeiture of any land grant heretofore made to said company."

Not only have we here the clear statement that the railroad company

has no present title of any kind, and cannot have until after the examination and classification provided for, to any of these lands within the place or indemnity limits, but it is so repeated in different forms in the act, that no doubts of the design of Congress can be entertained. If the company has no present title, it must follow that it remains in the Government, and that the State cannot exercise the power of taxation.

It is urged, and not without logic, that if the company now has no title of these lands, it is not concerned in their taxation, and should not be heard to object thereto, and that if the lands belong to the company it cannot object. The injustice and hardship of this view is that, as will be conceded by all, some of these lands will be held by the Government as mineral lands. As it cannot
78 now be determined which will be so found, the company, to avoid all risk of doubt upon the title to those which may be finally awarded to it, must pay upon all, and in the future claim repayment of taxes erroneously paid. It may also be said that if the company now has no such title or claim to the lands as will justify their taxation, the threatened sale will cast no cloud. This leaves the company to assume all the risk, leads to unnecessary expense on the part of the State, and to possible clouding of the title of the lands, and not only to such uncertainty of title as may for years prevent their occupation and improvement, but to possible multiplicity of suits. While the courts favor the collection of taxes as a burden in which all should bear their just part, there is not sufficient reason why it should force this company to submit to an injustice in order to protect its right. When the Government so withdraws its claim to, and so ceases to exercise jurisdiction and control over, these lands, that it may fairly be said the company has at least an equitable title to any distinct tracts or parcels thereof, the same may be taxed, and should not be before.

The objection that this tax cannot be stayed by injunction is answered by the Railroad Land Tax case, 133 U. S., *ante*.

It is therefore ordered that the demurrer be overruled, and that this order operate to continue the existing restraining order.

Dated June 20th, 1895.

BEATTY, *Judge*.

79 In the absence of counsel, it is ordered that each have thirty days, or such further time as may be asked, after notice of this decision as may be desired.

BEATTY, *Judge*.

(Endorsed:) Title of court and cause. Opinion. Filed June 22, 1895. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 26th day of July, 1895, the defendant herein filed his answer, which said answer is in the words and figures as follows, to wit:

To the judges of the United States circuit court for the district of Montana:

THOMAS F. OAKES, HENRY C. PAYNE, and HENRY C. ROUSE, Receivers of the Northern Pacific Railroad Company, Complainants,

vs.

W. V. MYER-, Treasurer of Jefferson County, Montana, Defendant.

80 *Answer.*

The answer of the above-named defendant to the bill of complaint of the above-named plaintiffs.

In answer to the said bill of complaint, William V. Myers says as follows:

I.

That not acknowledging or confessing all or any part of the matters or things in the said bill of complaint mentioned to be true in such manner and form as the same are within set forth and alleged, except as hereinafter admitted, he pleads hereto, and for answer says:

That he admits at the date of the grant to said railroad company, and at the time the line of said railroad coterminous with the lands described in Schedule "A" annexed to plaintiffs' bill of complaint was definitely fixed, and the plat thereof filed in the office of the Commissioner of the General Land Office, the said lands mentioned as aforesaid were not reserved, sold, granted, or otherwise appropriated, and that there were at said time no filing- or entries, or applications to make filings or entries, of any nature whatsoever upon or for said land, or any thereof in the United States district land office, for the district in which such lands were situated, nor in the office of the Commissioner of the General Land Office; that said lands appeared on the records of said office as free from pre-emption or other claims or rights; that said lands and each and every

81 part thereof prior to the assessments and tax levies mentioned in plaintiffs' bill of complaint were surveyed by the United States, or under its authority, and were reported by the surveyors making such surveys to be agricultural land and non-mineral in character, and that as yet no mineral in quantities sufficient to add to the richness of said lands or to justify expenditures for their contracting by any methods of mining now in use or known to exist *having* been discovered in said lands.

Admits, that after the construction and approval of said railroad and telegraph line by the President of the United States, and long prior to said assessment and tax levies, said railroad company prepared and filed with the register and receiver of the United States district land office, within and for the district in which said lands were situated, lists of lands claimed by said railroad company as inured to it under its grant by virtue of the construction and approval of said portions of said railroad, including among others

the lands described in Schedule "A," annexed to the plaintiffs' bill of complaint, and at the same time pay the register and receiver of the United States district land office the fees to which they were by reason of such listing and filing entitled.

II.

And further answering defendant says, that at the various times of the filing of each of said lists of land referred to in complainants' bill of complaint the Northern Pacific Railroad Company, by and through its duly authorized and acting land agent, being
82 then and there land commissioner of the said Northern Pacific Railroad Company, attached to each of said lists an affidavit duly executed, to the effect that the lands selected by him and included in said lists was a correct list of a portion of the land claimed by said railroad company, as inuring to said company to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast by the northern route, for which a grant of lands was made by an act of Congress approved July 2, 1864, and the general resolution approved May 31, 1870, and that the lands included in each of said lists were vacant, unappropriated, and were not interdicted mineral or reserved lands, and were of the character contemplated by the grant, being within the limits of forty miles on each side of the line of route of said railroad, all of which said affidavits, though executed at different times and by different land commissioners of said railroad company, were in the form following, to wit:

"STATE OF MINNESOTA, } 88:
County of Ramsey, }

I, Charles B. Lamborn, being duly sworn, deposes and says that I am the land commissioner of the Northern Pacific Railroad Company; that the foregoing list of lands which I hereby select is a correct list of a portion of the public lands claimed by said Northern Pacific Railroad Company, as inuring to the said company to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast by the northern
83 route, for which a grant of lands was made by an act of Congress approved July 2, 1864, and the general resolution approved May 31, 1870; that the said lands are vacant, unappropriated, and are not interdicted mineral or reserved lands, and are of the character contemplated by the grant, being within the limits of forty miles on each side of the line of route for a continuous distance of —, being a portion of said lands for a section of — miles of said railroad commencing — and ending —.

CHARLES B. LAMBORN.

Sworn and subscribed before me this 26 day of January, 1887.

S. S. STARIN,
Notary Public."

That thereupon the register and receiver of the United States land office at Helena, Montana, attached to each of said lists of lands selected by said railroad company as aforesaid their certificates, in which they certified that they had carefully and critically examined said lists of lands claimed by the Northern Pacific Railroad Company under the grant to said company by act of Congress approved July 2, 1864, and joint resolutions approved May 31, 1870, selected by said Northern Pacific Railroad Company by its duly authorized agent, and that they had tested the accuracy of said lands by the plats and records of said office, and found same to be correct.

They further certified that the filing of said lands was allowed and approved, and that the whole of said lands were surveyed public lands of the United States, and were within the limits of forty miles on each side of said railroad, and that the same were
84 not, nor was any part thereof, returned or denominated mineral land or lands, or claimed as swamp lands, nor were there any homestead, pre-emption, State, or other valid claims, to any portion of said lands on file or of record in their said office. And they further certified that the said company had paid the fees payable to said United States land office allowed by the act of Congress approved July 1, 1864, and that said company had paid to the said receiver the full sum of said fees.

III.

And further answering defendant says that said company ought not to be permitted to plead that "because said lands were at the time of said attempted assessments and tax levies not defined or identified as a part of the lands granted to said railroad company, and were not segregated from the public lands of the United States, and because said lands are not now so identified and defined and segregated, and because of the existence of the claims by the United States thereto *advised* to the claim of said railroad company in and to said lands * * * ," and of the contest thereover pending in the Interior Department, said lands were not, nor was any portion thereof, subject to assessment and taxation for or during the year 1894, for the reason that said railroad company, by its duly authorized land agent, being the land commissioner of said company at the times and in the manner and form as aforesaid set out, made selections of said lands, and attached affidavits duly executed to the lists of lands by said company selected as aforesaid, stating that the said
85 lands were vacant, unappropriated, and were not interdicted mineral or reserved lands, and were of the character contemplated by the grant, being within the limits of forty miles on each side of the line of route of said railroad, the said lands in said affidavit referred to being the identical lands upon which the assessment and tax levies referred to in complainants' bill of complaint were made by the proper and duly qualified officers of Jefferson county.

And for the further reason that the register and receiver of the

land office certified that the lands selected by said company were surveyed public lands of the United States, within the limit of forty miles on each side, and that the same were not, or any part thereof, returned or denominated mineral land or lands, nor claimed as swamp lands, nor was there any homestead, or pre-emption, State, or other valid claim to any portion of said lands on file or of record in their said office.

IV.

And further answering defendant says that said lists were duly filed by the United States land officers at Helena, Montana, and were thereupon, in accordance with the rules of practice of the Interior Department, transmitted to the office of the Commissioner of the General Land Office, but denies that there were transmitted to the said Commissioner to be held until said lands should be examined and it could be ascertained and determined whether they were mineral or non-mineral lands, and whether they were
86 free from pre-emption or other claims or rights at the time the line of said railroad opposite thereto was definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office; denies that they were to be held in the office of said Commissioner until all claims thereto adverse to the said railroad company's claim should be investigated, and all contests decided; denies upon information and belief that the United States, by its officers and agents in the Interior Department and in the General Land Office, began thereupon at any time, or ever, or at all, an examination of the said lands, and each and every tract thereof, or any part thereof, to ascertain and determine whether said lands were or are mineral in character, or whether they were for any reason excluded from the said grant to said railroad company made by the act of Congress approved July 2, 1864, and the acts and joint resolutions supplemental thereto; denies upon information and belief that said officers and agents have since proceeded with such an examination, and that they have heard or proceeded to hear any contest arising upon claims to said lands mentioned in Schedule "A" annexed to plaintiffs' bill of complaint, asserted adversely to the claim of the Northern Pacific Railroad Company; denies upon information and belief that at the time of the assessments and tax levies mentioned in plaintiffs' bill of complaint the United States, by its officers and agents, was, or at any time has been, or is now, proceeding with the examination of said lands, and each and every tract thereof, or any part thereof, and ascertaining and determining whether the said lands are non-mineral or are for any reason excluded from the grant
87 to said railroad company made by said act of Congress of July 2, 1864, and the acts and joint resolutions of Congress supplemental thereto, and denies that said officers and agents are hearing contests arising concerning the same; denies upon information and belief that after the said lists hereinbefore referred to were filed and transmitted to the Commissioner of the General Land Office, a claim adverse to the said railroad company to the lands

mentioned in said Schedule "A," or any part thereof, was set up by the United States, and the claim of said railroad company thereto was questioned, denied, or contested; denies that any contest at all, on behalf of the United States, to these said lands was pending at the time of the assessments and tax levies mentioned in plaintiffs' bill of complaint, or that any such contest has since been or is now pending; denies that there is any controversy and contest at all between the United States and the said railroad company over questions of fact or otherwise as to said lands. Defendant further answering alleges that at the time of the said assessment and tax levies the lands described in said Schedule "A" had never been reserved as mineral lands but had been ascertained and determined to be a part of the lands granted to said company as aforesaid, and that they were segregated from the public lands of the United States, by the grant thereof to said railroad company, and were classified as non-mineral lands by the officers of said railroad company and of the Land Department of the United States, and that said company had, and still has, such right, title, interest, and property in said lands as was conferred upon it by said act of
88 Congress approved July 2, 1864, and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof; denies that at the time of said assessment and tax levies the United States had and asserted to all of said lands described in said Schedule "A," or to any part thereof, a potential claim thereto, or still has and asserts such claim, or any claim at all thereto, because of the non-identification thereof as a part of the lands granted to said railroad company, or because of anything at all.

And further answering defendant alleges that in the year 1894 said lands mentioned in Schedule "A," and each and every part thereof, was subject to assessment and taxation under the laws of Congress and the State of Montana.

V.

Denies that any delay in the issuance of patents to said lands has been caused by the adverse claims of the United States, or of any other party thereto, or to enable the United States to have an opportunity to examine said lands, or cause them to be examined, so that it might determine their mineral or non-mineral character, and determine whether they were free from pre-emption or other claims or rights at the time the line of said railroad coterminous herewith was definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office, or by anything at all in the name of, or for the benefit of, the United States or any party whomsoever; denies that any delay in the issuance of patents thereto had been to enable the United States to segregate from the public
89 lands the lands mentioned in said Schedule "A," or that the United States may be enabled to collect the costs of surveying and conveying these said lands.

VI.

Alleges that the act of Congress approved February 26, 1895, has the effect to prevent the issuing of patents to said lands until such classification is made, but that it does not in any manner or at all invalidate the grant to the Northern Pacific Railroad Company, or deprive it of such title in and to said lands as it held at the time of the making of affidavits to their non-mineral character by and through its duly authorized agents as aforesaid.

VII.

Denies upon information and belief that said lands described in Schedule "A," or any part or portion thereof, when examined and classified as provided for in the act of Congress approved on or about February 27, 1895, entitled "An act to provide for the examination and classification of certain mineral lands in the States of Montana and Idaho," will be held and determined to be mineral lands and excluded from the grant to said Northern Pacific Railroad Company; denies that until such examination and classification is completed as is provided for in said act of Congress, the complainants herein cannot ascertain or know what part of said lands are granted and what part thereof are mineral lands excluded from said grant
90 of said Northern Pacific Railroad Company, but alleges the fact to be that said lands described in Schedule "A" are more valuable for agricultural purposes than they are for mineral purposes, and, as defendant believes, will be so classified and found by the commissioners appointed under the provisions of said act of Congress to examine said lands; that said lands contain no valuable mineral deposits or mineral in quantities sufficient to justify expenditures for the extracting of the same, excepting only iron and coal, and upon information and belief defendant alleges that no mineral locations have ever been made or filed upon any of said lands assessed and taxes in Jefferson county as aforesaid.

VIII.

Denies that the receivers of the Northern Pacific Railroad Company, the complainants herein, are endeavoring to have the land mentioned in Schedule "A" defined, identified, and segregated from the public land of the United States; denies that the said receivers have as yet been unable to secure patents to the said described lands, because there is an adverse claim thereto existing, and because the United States have not yet examined the said lands and ascertained and determined whether or not the said lands inure to said company under the terms of the act of July 2, 1864.

IX.

And further answering defendant alleges that the amount due from said railroad company for the costs of surveying and
91 conveying said lands can and could be ascertained at any time after said survey and application for patents therefor,

and alleges the fact to be that said lands have already been segregated, identified, and determined to be lands of the railroad company, both by duly appointed and acting officers of said company and of the United States.

X.

Denies that the United States withholds patents for said lands solely because the officers and agents of the United States have not yet ascertained and determined whether said lands were or are of the character of lands granted to said company, because said lands were not ascertained and determined to be granted lands, and have not been segregated from the public lands of the United States, and because of the claims thereto adverse to the claims of said railroad company under said grant.

And further answering defendant alleges that said lands, if sold by the treasurer of Jefferson county, the defendant herein, will be, and can only be, sold subject to the lien of the United States for the costs of surveying, selecting, and conveying said lands, and cannot and would not convey to the purchaser an absolute title to said lands, any laws or statutes of the State of Montana to the contrary notwithstanding; alleges that at such sale, if a sale of said lands be had, the United States may become a preferred purchaser, any laws or statutes of the State of Montana to the contrary notwithstanding.

92 XI.

Denies that if deeds be issued by the treasurer of Jefferson county for any part or portion of said lands, the said deeds if not void will convey to the purchaser at said sale the absolute title to the lands herein described; denies that said deeds, if issued, can or will constitute a cloud upon the title of the Northern Pacific Railroad Company, if the said railroad company has only a potential interest in the lands herein described as alleged in plaintiffs' bill of complaint; denies that the said assessments and tax levies cloud the title of the railroad company to the said described lands, and impair the value thereof as an asset in the hands of the complainants herein, the receivers of said railroad company, if said railroad company had but a potential interest in said lands as alleged in complainants' bill of complaint; denies that the issuance of certificates and deeds, if they shall be issued by the treasurer of Jefferson county, to said lands, will or could constitute further clouds upon the title of the railroad company to said described lands. And further answering defendant denies that if the said lands be sold a multiplicity of suits will be necessary to quiet the title thereto and to remove the cloud thereby created, and alleges that the said receivers of said railroad company are authorized to pay taxes upon the lands described in Schedule "A," and alleges that they could have obtained and can obtain money and funds for such purposes if they elect so to do; defendant denies that if a judgment should be recovered by said railroad company against the county of Jefferson for taxes
93 paid by said company, the same would be paid in county warrants, and denies that the warrants of the county cannot

be sold for their face value, but on the contrary alleges that in case any judgment is or should be recovered against said county, that the county commissioners are required by law to levy a special tax to pay the same, and that such judgment is and would be paid in money in the manner provided by the laws of the State of Montana. And defendant further alleges upon information and belief that all warrants issued by the proper officers of Jefferson county are called in and paid out of the taxes levied and collected for the fiscal year in which said warrants are issued.

XII.

And further answering defendant alleges that the Supreme Court of the United States has decided that the title of the lands granted to the Northern Pacific Railroad Company under the act of July 2, 1864, with certain designated exceptions, took effect as of the date of the grant, and that such title was a title to the lands which, at the time of the grant, were not reserved as minerals, and of the lands which at the time of the location had not been sold, reserved, or to which pre-emption or homestead rights had not attached.

That the Supreme Court of the United States has decided that "the property of the Northern Pacific Railroad Company could be taxed for its value, to the extent of the title which is of the land, and that the property could be appraised without including
94 any consideration of the minerals," and that such property could be as well estimated by the proper officers of the county, as to its value excluding the minerals, as to its value including the minerals.

And further answering defendant says that the assessor and the treasurer of Jefferson county, in making the assessment and levies in plaintiffs' bill of complaint referred to, appraised and taxed the property mentioned in said Schedule "A," for its value only as agricultural or grazing lands, without including any consideration for the minerals that might be found therein, and without assessing or taxing any minerals within the lands described in the said Schedule "A."

XIII.

The defendant further alleges that said railroad company has since the assessment of said property earned large sums of money by being operated by the receivers thereof, and that said receivers had at the time of the levy of the said taxes, and ever since have had, a sufficient sum of money which was available to pay the taxes assessed and levied by the officers of Jefferson county, and that said taxes and all thereof were at the time of the filing of the bill of complaint herein, and still are, due and unpaid to the county of Jefferson in the sum of $3,234.92.

Wherefore, defendant prays that the restraining order heretofore issued and continued by the court in this case be vacated and dissolved, and that the defendant be authorized and empowered
95 to sell a sufficient amount of said lands mentioned in said Schedule "A" to collect and pay the taxes now due thereon

for the year 1894, in accordance with the provisions of an "Act concerning revenue" of the State of Montana, approved March 6, 1891, and that he have his costs incurred in this section.

H. J. HASKELL,
ELLA KNOWLES HASKELL,
Solicitors for Defendant.

STATE OF MONTANA, }
County of Lewis and Clarke, } ss:

Henri J. Haskell, being first duly sworn, deposes and says that he is one of the solicitors for the defendant; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to those matters which are herein stated on information and belief, and as to those matters he believes it to be true; that the reason why the verification is not made by the defendant is that he is not within the county of Lewis and Clarke, which is the county where I reside.

HENRI J. HASKELL.

Subscribed and sworn to before me this 25 day of July, A. D. 1895.

L. ROTWITT,
Sec'y of State.

Service of copy of the foregoing accepted this 26 day of July, 1895.

CULLEN & TOOLE,
Of Att'ys for Complainants.

96 (Endorsed:) Title of court and cause. Answer. Filed July 26, 1895. Geo. W. Sproule, clerk.

And thereafter, to wit, Sept. 13, 1895, the complainant herein filed *its* exceptions to the answer, which said exceptions are in the words and figures as follows, to wit:

United States Circuit Court for the District of Montana.

THOMAS F. OAKES, HENRY C. PAYNE, and HENRY C. ROUSE, as Receivers of the Northern Pacific Railroad Company, Complainants,

vs.

W. V. MEYERS, Treasurer of Jefferson County, Montana, Defendant.

Exceptions to Answer.

Exceptions taken to the answer in said case filed for expunging the impertinent matter therein contained.

First. The complainants except to so much of said answer as is contained within the second paragraph thereof, for that the same is impertinent.

Second. The said complainants except to so much of said answer

as is included within the third paragraph thereof, for that the same is impertinent.

97 Third. Complainants except to the following portion of the seventh paragraph of said answer, to wit: "Denies that until such examination and classification is completed as is provided for in said act of Congress, the complainants herein cannot ascertain or know what part of said lands are granted, and what part thereof are mineral lands excluded from the grant to said Northern Pacific Railroad Company," for that the same is impertinent.

Fourth. Complainants except to the following portion of the seventh paragraph of said answer, to wit: "But alleges the fact to be that said lands described in Schedule 'A' are more valuable for agricultural purposes than they are for mineral purposes," for that the same is impertinent.

Fifth. Complainants except to the following portion of paragraph seven of defendant's answer herein, to wit: "That said lands contain no valuable mineral deposits, or mineral in quantities sufficient to justify expenditures for the extraction of the same, excepting only iron and coal," for that the same is impertinent.

Sixth. Complainants except to so much of said answer as is contained within the ninth paragraph thereof, for that the same is impertinent.

Seventh. Complainants except to the following portion of paragraph ten of the answer of said defendants herein, to wit: "And further answering defendant alleges that said lands, if sold by the treasurer of Jefferson county, the defendant herein, will be,

98 and can only be, sold subject to the lien of the United States for the costs of surveying, selecting, and conveying said lands, and cannot, and would not, convey to the purchaser an absolute title to said lands, any laws or statutes of the State of Montana to the contrary notwithstanding. Alleges that at such sale, if a sale of said lands be had, the United States may become a preferred purchaser, any laws or statutes of the State of Montana to the contrary notwithstanding," for that the same is impertinent.

Eighth. Complainants except to the prayer contained in defendant's answer herein, for that the same is impertinent.

Wherefore the complainants except to the said answer, and pray that such impertinent matter be expunged therefrom.

F. M. DUDLEY,
Solicitor for Complainants.

Service by copy of above is hereby acknowledged.
Sept. 13, 1895.

H. J. HASKELL,
Attorney General.

(Endorsed:) No. 365. T. F. Oakes *et al.*, receivers, *v.* W. V. Meyers, treasurer, etc. Exceptions to answer. Filed Sept. 13, 1895. Geo. W. Sproule, clerk.

99 And thereafter, to wit, on the 11th day of January, 1896, the following further proceedings were had and entered of record herein in the words and figures as follows, to wit:

United States Circuit Court for the District of Montana, November Term, A. D. 1895, in Open Court.

SATURDAY, 11*th Day of January*, 1896.

T. F. OAKES *et al.*, Receivers,
vs.
W. V. MYERS, Treasurer. } No. 365.

Order Sustaining and Overruling Exceptions.

This cause heretofore set for hearing this day on plaintiffs' exceptions to answer of defendant came on regularly for hearing, W. E. Cullen, Esq., appearing on behalf of plaintiffs, and H. J. Haskell, Esq., attorney general of the State of Montana, appearing on behalf of defendant, and after argument of counsel exceptions submitted, and after due consideration it is ordered that exceptions one and two be sustained, and other exceptions overruled; to which ruling overruling as to certain exceptions plaintiff- then and there excepted, and exception noted.

100 And thereafter, to wit, on the 18th day of January, 1896, the complainants herein filed their replication, which is in the words and figures as follows, to wit:

Circuit Court of the United States, District of Montana. In Equity.

THOMAS F. OAKES, HENRY C. PAYNE, and HENRY C. ROUSE, as Receivers of the Northern Pacific Railroad Company, Complainants,
vs.
WILLIAM V. MEYERS, as Treasurer of Jefferson County, in the State of Montana, Defendant.

Replication to Answer.

These replicants, Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendant, for replication thereunto say that they do and will aver, maintain, and prove their said bill to be true, certain, and sufficient in the law to be answered unto by the said defend-
101 ant, and that the answer of said defendant is very uncertain, evasive, and insufficient in law to be replied unto by these replicants; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters

and things these replicants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

CULLEN & TOOLE,
F. M. DUDLEY,
Solicitors for Complainants.

(Endorsed:) No. 365. Thomas F. Oakes *et al. v.* Wm. V. Meyers, as treasurer of Jefferson county. Replication. Service by copy of within is hereby acknowledged Jan. 18, 1896. H. J. Haskell, solicitor for defendant. Filed Jan. 18, 1896. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 27th day of June, 1896, a stipulation was filed herein, which said stipulation as filed is in the words and figures as follows, to wit:

102 Circuit Court of the United States, District of Montana.

THOMAS F. OAKES, HENRY C. PAYNE, and HENRY C. ROUSE, as Receivers of the Northern Pacific Railroad Company, Complainants,

vs.

WILLIAM V. MEYERS, as Treasurer of Jefferson County, Montana, Defendant.

Stipulation.

It is hereby stipulated by and between the parties hereto, by their respective counsel, that an order may be entered by the court providing that in the event that the lands described in the complaint are held subject to taxation, the defendant county may proceed to enforce the collection of said tax in the manner provided by law.

F. M. DUDLEY,
Solicitor for Complainants.
H. J. HASKELL,
ELLA K. HASKELL,
Solicitors for Defendant.

(Endorsed:) Title of court and cause. Stipulation. Filed June 27, 1896. Geo. W. Sproule, clerk.

103 And thereafter, to wit, on the 27th day of June, 1896, the following order was made and entered of record herein in the words and figures as follows, to wit:

Circuit Court of the United States, District of Montana.

THOMAS F. OAKES, HENRY C. PAYNE, and HENRY C. ROUSE, as Receivers of the Northern Pacific Railroad Company, Complainants,

vs.

WILLIAM V. MEYERS, as Treasurer of Jefferson County, Montana, Defendant.

Order upon Stipulation Authorizing Treasurer to Enforce Payment of Taxes.

On reading stipulation of the parties hereto, filed this 27th day of June, 1896, it is hereby ordered that in the event the lands described in the bill of complaint herein shall be held subject to taxation, the said defendant county treasurer may proceed to enforce the payment of said taxes in the manner provided by law.

Dated this 27 day of June, 1896.

HIRAM KNOWLES, *Judge.*

104 (Endorsed:) Title of court and cause. Order. Filed and entered June 27, 1896. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 27th day of June, 1896, a stipulation of facts was filed herein, which said stipulation is in the words and figures as follows, to wit:

United States Circuit Court for the District of Montana.

THOMAS F. OAKES, HENRY C. PAYNE, and HENRY C. ROUSE, as Receivers of the Northern Pacific Railroad Company, Complainants,

vs.

WILLIAM V. MEYERS, Treasurer of Jefferson County, Montana, Defendant.

Stipulation of Facts.

It is hereby stipulated by and between the parties hereto by their respective counsel, that for the purpose of the trial of this action the following facts shall be deemed taken to be true:

First. That said Northern Pacific Railroad Company is a
105 corporation created, organized, and existing under and by virtue of an act of Congress, approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast by the northern route," and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

That by the terms and provisions of said act said corporation was authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line with

the appurtenances, beginning at a point on Lake Superior in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as should be determined by said company, within the territory of the United States on a line north of the forty-fifth degree of latitude to some point on Puget sound, with a branch via the Columbia river, to a point at or near Portland, in the State of Oregon.

By the third section of said act lands were granted to said railroad company as follows:

"That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States,
and ten alternate sections of land per mile on each side of
106 said railroad whenever it passes through any State, and
whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied, by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. * * * Provided, further, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd sections, nearest to the line of said road, may be selected as above provided; and further provided, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal."

By section 4 of said act it was further provided that whenever said company should have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States should appoint three commissioners to examine the same; and if it should appear that such twenty-five consecutive miles of said road and telegraph line
had been completed in a good, substantial, and workman-
107 like manner, as in all other respects required by said act,
the commissioners should so report to the President of the United States, and patents of lands as aforesaid should be issued to said company, confirming to said company all right and title to said lands situated opposite to and coterminous with said completed section of said road, and that whenever, from time to time, twenty-five additional consecutive miles should have been constructed, completed, and in readiness as aforesaid, and verified by said com-

missioners to the President of the United States, then patents should be issued to said company conveying the additional sections of land as aforesaid; and so on as fast as every twenty-five miles of said road should be so completed.

Second. That the said railroad company duly accepted the terms, conditions, and impositions of said act, and signified such acceptance in writing under the corporate seal of said company duly executed pursuant to the direction of its board of directors first had and obtained, and within two years after the passage of said act, to wit, December 29, 1864, served such acceptance on the President of the United States.

Third. That thereafter, and prior to the year 1888, said railroad company definitely fixed the line of its said railroad extending from the waters of Lake Superior to a point on Puget sound, and prior to said year constructed, and caused to be constructed and put into operation, a continuous line of railroad and telegraph, extending from the waters of Lake Superior westerly across the State
108 of Minnesota and the Territories of Dakota, Montana, Idaho, and Washington, to the waters of Puget sound. That as fast as portions of said railroad and telegraph line equal to or exceeding twenty-five miles in length were so constructed as aforesaid, they were examined by commissioners appointed by the President of the United States; and by said commissioners were found and reported to have been constructed in a good, substantial, and workmanlike manner, in all respects as required by said act of Congress. That such reports were duly accepted and approved by the President of the United States, as provided in said act of Congress of July 2, 1864.

That the portion of said railroad line extending from the last crossing of the Yellowstone river, at or near the western boundary of the Crow Indian reserve, to the Little Blackfoot river, in the Territory, now State, of Montana, was definitely fixed prior to July 6, 1882, and on that day a plat thereof, approved by the Secretary of the Interior, was duly filed in the office of the Commissioner of the General Land Office. That the lands described in the complaint are coterminous with said portion of said railroad line.

That at the date of said grant to said railroad company and at the time the line of said railroad coterminous with the lands described in the complaint was definitely fixed and the plat thereof filed in the office of the Commissioner of the General Land Office, as aforesaid, said lands were not reserved, sold, granted, or otherwise appropriated; and there were at said times no filing or
109 entries, or applications to make filing or entry, of any nature whatsoever, upon or for said lands, or any thereof in the United States district land office for the district in which said lands were situated, nor in the office of the Commissioner of the General Land Office; and said lands appeared on the records of said office as free from pre-emption or other claims or rights. That said lands, and each and every part thereof, were prior to the attempted assessments and tax levies hereinafter referred to surveyed by the United States or under its authority, and were reported by the surveyors

making such surveys to be agricultural lands, and non-mineral in character.

That after the construction and approval of said railroad and telegraph line as aforesaid, and long prior to the assessment and tax levies complained of, said railroad company prepared, in the form prescribed by the Secretary of the Interior and filed with the register and receiver of the United States district land office for the district in which said lands were situate, lists of lands claimed by said company as inuring to it under its said grant by virtue of the construction and approval of said portions of said railroad, including, among others, the lands described in the complaint; and at said time paid to the register and receiver of the United States district land office the fees to which they were, by the reason of such listing and filing, entitled.

That attached to each of said lists was an affidavit by the land commissioner of said Northern Pacific Railroad Company, which said affidavits were executed at different times and were in the form following, to wit:

110 "STATE OF MINNESOTA, } ss:
County of Ramsey, }

I, Charles B. Lamborn, being duly sworn, depose and say that I am the land commissioner of the Northern Pacific Railroad Company; that the foregoing lists of lands which I hereby select is a correct list of a portion of the public lands claimed by said Northern Pacific Railroad Company as inuring to the said company, to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast, by the northern route, for which a grant of lands was made by an act of Congress approved July 2, 1864, and a joint resolution approved May 31, 1870.

That the said lands are vacant, unappropriated, and are not interdicted mineral or reserved lands, and are of the character contemplated by the grant, being within the limit of forty miles on each side of the line of route for a continuous distance of —, being a portion of said lands for a section of — miles of said railroad, commencing at — and ending at —.

(Signed) CHARLES B. LAMBORN.

Subscribed and sworn to before me this 26 day of January, 1887.

P. P. STARIN,
Notary Public."

That said lists were duly filed by the said United States district land officers, and the said officers having tested the accuracy of said lists by the plats and records of their said office, attached to
111 each of said lists a certificate in substantially the following form (said lists differing in dates, amounts of fees, etc.):

"UNITED STATES LAND OFFICE,
HELENA, MONTANA, *September* 21, 1892.

We hereby certify that we have carefully and critically examined the foregoing lists of lands claimed by the Northern Pacific Rail-

road Company under the grant to said company by act of Congress, approved July 2, 1864, and joint resolution approved May 31, 1870, and selected by said Northern Pacific Railroad Company by Charles B. Lamborn, the duly authorized agent; and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct.

And we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and within the limit of 40 miles on each side, and that the same are not, nor is any part thereof, returned and denominated as mineral land or lands, nor claimed as swamp lands, nor is there any homestead, pre-emption, State, or other valid claim to any portion of said lands on file or record in this office.

We further certify that the foregoing list shows an assessment of the fees payable to us, allowed by the act of Congress, approved July 1, 1864, and contemplated by the circular of instruction dated November 7, 1879, addressed by the Commissioner of the General Land Office to registers and receivers of the United States
112 land offices; and that the said company have paid to the undersigned, the receiver, the full sum of three hundred and forty-six dollars ($346) in full payment and discharge of said fees.

(Signed) S. A. SWIGGERT, *Register.*
(Signed) M. BOURQUIN, *Receiver.*"

That thereafter, in accordance with the rules of practice of the Interior Department, the said district land officers transmitted said lists to the office of the Commissioner of the General Land Office.

That the practice, with reference to such lists, which obtains in the Interior Department is as follows: Such lists are, upon their receipt at the office of the Commissioner of the General Land Office, transmitted to the railroad division to be examined for the purpose of ascertaining and determining whether they are within the limit of the grant, and whether the conditions of the grant so far as pertains to these lands, have been duly complied with by the railroad company. They are thereafter transmitted to the different divisions, including the mineral-land division, for examination and determination in each of said divisions, whether the lands fall within exceptions from said grant. That after all lands which may be ascertained and determined to be excepted from the grant, for the cause are eliminated, a clear list of lands is made up and approved by the Commissioner of the General Land Office, and by the Commissioner of the General Land Office is certified to the Secretary of the
113 Interior for his approval. That such lands are not patented or certified to the company until the clear lists are approved by the Secretary.

That the lists, including the lands described in the complaint, had not, at the time of the assessments and tax levies complained of, and have not yet, been adjusted in the office of the Commissioner of the General Land Office; the various divisions in the Commissioner's office have not yet examined or passed upon said lists, and it has not yet been determined in said office what lands are within

the terms of the grant to said company; and none of said described lands have been certified by the Commissioner to the Secretary of the Interior, or have been patented by the said United States to said company; and the question whether said lands are mineral or non-mineral in character is now under investigation under the terms and provisions of the act of Congress approved February 26, 1895, as hereinafter more fully set forth.

That said railroad company has such right, title, interest, and property in and to said lands as was conferred upon it by the act of Congress approved July 2, 1864, and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof, and acquired by its compliance with the terms and provisions of said act and joint resolution as hereinbefore set out, and has no other right, title, claim, interest, or demand in or to said lands whatsoever.

It is admitted that November 14, 1889, Thomas G. Merrill,
114 a citizen of the State of Montana, transmitted to the Secretary of the Interior the following letter:

"WASHINGTON, D. C., *October 14th*, 1889.

Hon. J. W. Noble, Secretary of the Interior.

SIR: Referring to personal interviews with you in my capacity as the accredited agent of the mineral claimants and citizens of Montana, and to documentary evidence on file in your department showing that the selections by the Northern Pacific R. R. Company are exclusively of lands in mineral districts, and that such selections embraced thousands of recorded mineral claims and extensive mining properties now being prospected, developed, and worked, and in view of the irreparable injury which would be caused to the people and State of Montana by the premature or unlawful conveyance of title to such lands to the railroad company, I beg leave to formally file the following requests:

That the Commissioner of the General Land Office be directed to suspend the patenting of lands in Montana to the Northern Pacific R. R. Company until the mineral or non-mineral character of the lands selected by said company shall have been investigated and definitely ascertained and adjudicated by proper proceedings, and until mineral claimants and the State of Montana shall have opportunity to be heard before the department on questions of law and fact.

2. That the Commissioner be directed to cause to be noted
115 on the lists of the company's selections the tracts and townships alleged to be mineral in character by affidavits now on file in the Department of the Interior.

Very respectfully, THOMAS G. MILLER,
Chairman Citizens' Executive Committee."

That November 4, 1889, the Secretary of the Interior referred said letter to the Commissioner of the General Land Office, with the following indorsement:

"Referred to Commissioner of Gen'l Land Office, with approval

of within requests and direction to comply thereunto. Please notify me when done.

Nov. 4, '89.

J. W. NOBLE, *Sec'y.*"

That said order was not revoked prior to 1895.

It is admitted that the said Northern Pacific Railroad Company, and the said receivers thereof, have been at all times diligent and active in obtaining the adjustment of said grant and in obtaining patents to said company for the granted lands, and have done everything in their means and power to obtain the final adjustment of the grant and to obtain patents for the land described in the complaint. The defendant denies that the lands have not been and are not fully defined and identified as a part of the grant to said railroad company, but concedes that the delay in such identification, if any there is, is not the result of any action, failure, or default on the part of said railroad company or the receivers thereof.

It is admitted that three commissioners have been appointed, under the terms and provisions of the act of Congress ap-
116 proved February 26, 1895, entitled "An act to provide for the examination and classification of certain mineral lands in the States of Montana and Idaho," to examine and classify the mineral lands in the Helena land district, including the lands described in the complaint herein; that the said commissioners commenced the examination and classification of lands in said district during the year 1895, and have since continued such examination and classification; that said commissioners have examined and classified a portion of the lands described in said complaint, and that of the lands so examined and classified the following have been classified as mineral:

Subdivision of section.	Number of section.	Number of town. N.	Number of range. E.	Tax.
All	1	5	1	
N. ½ of N. W. ¼, E. ½	3	5	1	
W. ½ of W. ½	5	5	1	
N. ½	11	5	1	
W. ½ of W. ½, S. E. ¼ of N. W. ¼, E. ½ of S. W. ¼	21	5	1	
All	29	5	1	
All	31	5	1	
S. W. ¼ of S. W. ¼	13	7	1	
N. ½ of N. W. ¼, S. W. ¼ of N. W. ¼	7	5	2	
E. ½ of S. E. ¼, S. W. ¼ of S. E. ¼	35	5	2	
S. E. ¼ of S. W. ¼ and lots 1, 2, 3, 4, 5 and 8	7	6	2	

	Subdivision of section.	Number of section.	Number of town. N.	Number of range. E.	Tax.
117	W. ½ of S. W. ¼, S. E. ¼ of S. W. ¼ and lots 4, 5, 6 and 9	17	6	2	
	All	19	6	2	
	W. ½	29	6	2	
	All	31	6	2	
	S. W. ¼ of N. E. ¼, S. E. ¼ of N. W. ¼, E. ½ of S. W. ¼, S. E. ¼ and lot 4	3	8	1	
	All	11	8	1	
	N. ½ (in contest)	13	8	1	
	N. E. ¼	15	8	1	
	E. ½, N. E. ¼ of N. W. ¼	9	9	1	
	N. ½ of S. W. ¼, S. E. ¼ of S. W. ¼	15	9	1	
	E. ½ of N. W. ¼, N. E. ¼ of N. E. ¼, W. ½ of N. E. ¼ and N. E. ¼ of S. W. ¼	1	1	3	
	And that the following-described lands have been classified as non-mineral in character:				
	S. W. ¼	3	5	1	
	E. ½ of N. W. ¼, E. ½ of S. W. ¼, S. E. ¼	5	5	1	
	N. ½ and E. ½ of S. E. ¼	9	5	1	
	S. ½	11	5	1	
	All	13	5	1	
	All	15	5	1	
	N. E. ¼ of N. E. ¼, N. E. ¼ of N. W. ¼, W. ½ of S. E. ¼, S. E. ¼ of S. E. ¼	21	5	1	
	N. ½ and N. ½ of S. W. ¼	23	5	1	
	N. W. ¼ and N. W. ¼ of N. E. ¼	27	5	1	
118	All	33	5	1	
	S. W. ¼ of N. W. ¼ and N. W. ¼ of S. W. ¼ and lots 5 and 10	1	7	1	
	N. E. ¼	11	7	1	
	N. ½ of N. E. ¼ and S. E. ¼ of S. W. ¼	13	7	1	
	N. E. ¼ of N. W. ¼, W. ½ of N. E. ¼, N. W. ¼ of S. E. ¼ and lots 1, 2, 3	11	8	1	
	N. W. ¼ of S. W. ¼ and lots 1 and 2	25	8	1	
	W. ½ of W. ½	35	8	1	
	Lot 12	5	9	1	
	S. ½ of S. ½, N. W. ¼ of S. W. ¼ and S. W. ¼ of N. W. ¼	17	9	1	
	N. ½ of N. W. ¼, S. E. ¼ of N. W. ¼ and N. E. ¼ of S. W. ¼ (in contest)	17	9	1	
	N. ½ of S. ½, N. W. ¼ and W. ½ of N. E. ¼	21	9	1	
	S. W. ¼ and S. W. ¼ of S. E. ¼	27	9	1	
	E. ½ of S. E. ¼, N. W. ¼ of S. E. ¼ and N. ½ of N. W. ¼	29	9	1	

Tax.	Subdivision of section.	Number of section.	Number of town. N.	Number of range. E.
	S. E. ¼, S. ½ of S. W. ¼, S. W. ¼ of N. E. ¼, and E. ½ of N. E. ¼	31	9	1
	N. W. ¼ of N. E. ¼ (in contest)	31	9	1
	All	33	9	1
	Lots 4, 5 and 6 (in contest)	3	2	2
	All	5	2	2
	All	7	2	2
	N. W. ¼ of N. W. ¼ and lots 1 and 2	9	2	2
	Lots 3, 4 and 5	17	2	2
119	Lots 4, 5, 8, and 9	1	3	2
	All	11	3	2
	W. ½ of S. W. ¼ and lots 2, 3, 4, 7, and 8	13	3	2
	All	21	3	2
	Fractional N. ½, N. ½ of S. E. ¼ and lots 3, 6, and 7	23	3	2
	W. ½ of W. ½ and lots 2, 3, 5, and 8	27	3	2
	All	33	3	2
	E. ½, S. E. ¼ of N. W. ¼, S. W. ¼	7	5	2
	Lots 2 and 6	9	5	2
	S. ½ of S. W. ¼ and lots 4, 5, and 6	15	5	2
	W. ½ of S. W. ¼, S. E. ¼ of S. W. ¼, and S. W. ¼ of S. E. ¼, N. ½ of N. E. ¼, S. E. ¼ of N. E. ¼ and N. E. ¼ of S. E. ¼	21	5	2
	All	27	5	2
	N. ½	29	5	2
	N. ½ of N. E. ¼	31	5	2
	All	33	5	2
	N. W. ¼ of N. W. ¼, S. ½ of N. ½, S. W. ¼, N. W. ¼ of S. E. ¼ and lots 2, 3, and 4	35	5	2
	N. E. ¼ of S. W. ¼ and lots 6 and 7	7	6	2
	Lot 3	21	6	2
	W. ½ of S. E. ¼	29	6	2
	Lot 3	27	6	2
	Lots 2, 4, 5, 6, 7, 10, 11, 12, and 13	19	7	2
	Lot 4	31	8	2
120	All (less 16.17 acres R. of W.)	1	8	1
	N. ½ of N. E. ¼, S. E. ¼ of N. E. ¼, N. E. ¼ of N. W. ¼	3	8	1
	S. W. ¼ of S. W. ¼	5	9	1
	S. E. ¼ of N. W. ¼	9	9	1
	S. W. ¼ of S. W. ¼	15	9	1
	N. ½, S. E. ¼, E. ½ of S. W. ¼ (less 23 acres R. of W.)	21	9	1
	N. E. ¼ of S. W. ¼	23	9	1
	S. E. ¼	23	9	1

Subdivision of section.	Number of section.	Number of town. N.	Number of range. E.	Tax.
N. E. ¼ and E. ½ of S. E. ¼ (in contest)				
E. ½ of N. W. ¼ and N. ½ of S. W. ¼	27	9	1	
W. ½ of N. W. ¼, W. ½ of S. W. ¼	1	1	3	
S. ½ of N. E. ¼ and N. ½ of S. E. ¼	5	1	3	
N. ½ of S. E. ¼, W. ½ of N. E. ¼, and N. ½ of S. W. ¼	9	1	3	
N. ½ of N. E. ¼	11	1	3	
Lot 3	7	1	4	
		N.	W.	
All that part north of Jefferson river (less 6 acres R. of W.)	1	1	4	
E. ½ of N. W. ¼ (less 6 acres R. of W.)	3	1	4	
S. E. ¼ of N. W. ¼ (less 12 acres R. of W., in contest)	3	1	4	
S. ½ of N. W. ¼ S. ½ and lot 3 (less 6 acres R. of W.)	5	1	4	
All	7	1	4	
N. E. ¼ of N. W. ¼ and lots 1 and 2	19	1	4	
121 S. E. ¼	29	1	4	
E. ½, N. W. ¼, and E. ½ of S. W. ¼	1	1	5	
All	3	1	5	
All	5	1	5	
All that part north of Fish creek	9	1	5	
N. W. ¼ of N. E. ¼ and N. ½ of N. W. ¼	13	1	5	

That the remainder of said lands have not yet been examined or classified by said Commissioner.

It is further admitted that of the lands described in said bill the following were, in 1894, involved in contests pending before the officers of the Interior Department between the Northern Pacific Railroad Company, and parties who had made mineral locations thereon and were claiming the same to be mineral in quality.

Subdivision of section.	No. of sec.	No. of t'p.	No. of R.
W. ½ of N. E. ¼	15	5 N.	3 W.
All	5	8 N.	3 W.
E. ½ of E. ½ and N. E. ¼ of S. W. ¼	9	8 N.	3 W.
E. ½ of S. E. ¼ of S. W. ¼; S. W. ¼ of S. E. ¼; W. ½ of S. W. ¼ of S. E. ¼, S. ½ of N. ½ of S. E. ¼ of S. W. ¼ and S. W. ¼ of S. E. ¼ of S. W. ¼	29	8 N.	3 W.
E. ½ of E. ½ of S. E. ¼, E. ½ of W. ½ of N. E. ¼ of S. E. ¼ and S. E. ¼ of N. E. ¼ of S. E. ¼	31	8 N.	3 W.
S. W. ¼ of N. E. ¼, W. ½ and S. E. ¼	17	2 N.	4 W.

122 That the Secretary of the Interior decided in 1894, and subsequent to the assessment complained of, that said section five, township eight north of range three west, was mineral and excepted from the grant to said railroad company.

That April 18th, 1895, the said Secretary of the Interior held in the said contest involving the S. W. ¼ of N. E. ¼ and W. ½ and S. E. ¼ of section 17, township 2 north of range 4 west, that said described land was mineral in character and excepted from the grant to said railroad company. That the remainder of said contests are still pending before the Secretary of the Interior.

It is further admitted that of the lands described in said bill the following were, in 1894, involved in contests pending before the officers of the Interior Department between the said Northern Pacific Railroad Company and settlers claiming that said lands were excepted from the grant to said company, because of the existence of settlement claims attaching to said lands at the date of the definite location of the line of said railroad opposite thereto, the existence of which claim- was disputed by said company:

Subdivision of section.	No. of sec.	No. of t'p.	No. of R.
N. W. ¼ of N. E. ¼	3	9 N.	1 E.
N. E. ¼	13	18 N.	1 E.
S. E. ¼ of N. W. ¼, N. E. ¼ of S. E. ¼ and S. ½ of S. W. ¼	13	2 N.	3 W.
E. ½ of N. E. ¼ and N. E. ¼ of S. E. ¼	33	2 N.	4 W.

123 That in the year 1895 the Secretary of the Interior determined said contests involving the N. W. ¼ of N. E. ¼ of section 3, township 9 N. of range 1 east, in favor of said railroad company.

That December 5th, 1894, the said Secretary of the Interior decided the contest involving the east half of northeast quarter and northeast quarter of southeast quarter of section thirty-three, township two north, of range four west, in favor of the said railroad company. That the remainder of said contests are still pending undetermined before the officers of the Interior Department.

That August 17, 1893, P. B. Winston, the Farmers' Loan and Trust Company, William C. Sheldon, George R. Sheldon, William S. P. Prentice, and William C. Sheldon, Jr., copartners, and doing business under the firm name and style of William C. Sheldon & Co., creditors of said Northern Pacific Railroad Company, commenced an action against said company by filing their bill of complaint in this court, wherein, among other things, they prayed that receivers might be appointed of all the property of said company; that on said day, the said defendant consenting, the said court then and there, by an order duly made, appointed Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse the receivers of said court of all and singular the said defendant Northern Pacific Railroad Company, and of the lands, railroads, assets, and property of said company within the jurisdiction of said court, and authorized and directed

said receivers to take possession of all and singular such property wherever situate or found, and to protect the title and possession of the same. And the said court then and there by its said
124 order commanded and enjoined the officers, directors, and employees of said Northern Pacific Railroad Company, and all other persons or corporations whatsoever, from interfering in any way with the possession and management of the property over which the receivers were appointed, or interfering in any way with the discharge of their duties as such receivers. That Exhibit "B," attached to the bill of complaint herein, is a true and correct copy of said order.

That thereafter, to wit, on the 30th day of October, 1893, the Farmers' Loan and Trust Company commenced an action in the United States circuit court for the district of Montana, against the Northern Pacific Railroad Company, Philip B. Winston, William C. Sheldon, George R. Sheldon, William S. P. Prentice, and William C. Sheldon, Jr., copartners, doing business under the firm name and style of William C. Sheldon & Co., and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, for the foreclosure of certain mortgages theretofore given by said railroad company upon all of its property, including its land grant, as more fully appears from the pleadings. That by an order fully made and entered by said court on said 7th day of November, 1893, said action was consolidated with the prior action, and the said Oakes, Payne, and Rouse were appointed receivers of the said Northern Pacific Railroad Company, and of the property of said company, as in said order appointing them made in the court August 17, 1893, with the rights, powers, and privileges in said order set forth, and their said receivership was extended
125 to the said consolidated cause. That the said Oakes, Payne, and Rouse duly qualified and filed their bonds as required by the court.

That thereafter, to wit, on the 9 day of January, 1896, Andrew F. Burleigh was duly appointed by said court receiver of said Northern Pacific Railroad Company, and of the property thereof in the place and stead of said Oakes, Payne, and Rouse. That thereafter the said Burleigh duly qualified as such receiver. That, as such receiver, said Burleigh has succeeded to, and is vested with, whatever right, title, or interest was acquired by said Northern Pacific Railroad Company, in and to the lands described in said bill of complaint, under said act of July 2nd, 1864, as hereinbefore set forth. That, as such receiver, he has duly proceeded with the adjustment of the land grant to said railroad company; and has done all acts and things necessary to that end by him required to be done.

That in the year 1894 the assessor of Jefferson county, Montana, proceeded to and did assess the lands described in the complaint herein, in the manner and form prescribed by law and described and included said lands in the assessment book of said county of Jefferson for said year. That Exhibit "X," hereunto attached, is a true copy of the entries in said assessment-roll relating to the lands described in the bill. That July 17, 1894, the receivers of said

Northern Pacific Railroad Company presented and filed with the board of equalization of said Jefferson county the following application:

126 "STATE OF MONTANA, }
County of Jefferson. }

To the board of county commissioners of said county, sitting as a board of equalization:

Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, receivers of the Northern Pacific Railroad Company, hereby make application to said board to strike from the tax assessment-roll of said county for the year 1894 all and singular the lands, and each and every parcel thereof, set forth and described in the list hereto attached, marked "A," containing 11 pages; or so much and such parts and parcels of said lands as are in said assessment-roll described as assessed, or returned as assessed or claimed to be assessed by the assessor of said county, or which have been added to said assessment-roll by the officers of said county, or any of them, or by said board of equalization or by its order; which are assessed or purported to be assessed for said year to said Northern Pacific Railroad Company, or to said Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, receivers, or to any other person or company as appears by said assessment-roll.

First. Because said lands are not, nor any of them, assessable or taxable for the year 1894.

Second. Because of irregularities in the assessment proceedings, in said assessment-roll and return thereof.

And said Thomas F. Oakes, Henry C. Payne, Henry C. Rouse, receivers of the said Northern Pacific Railroad Company,
127 hereby object to and protest against any assessments of said lands for taxes or the levying of any tax thereof for the year 1894.

Dated at St. Paul this 13 day of July, 1894.

THOMAS F. OAKES,
HENRY C. PAYNE,
HENRY C. ROUSE,
Receivers of Northern Pacific Railroad Company,
(Signed) By G. S. FERNALD,
Tax Commissioner for said Receivers."

That among the lands described in the list marked "A" attached to said application were all of the lands described in the bill of complaint herein. That the said board of equalization refused to strike said lands from the tax assessment-roll of said county, and thereafter the taxes levied by said county were assessed and levied upon the said described lands with the other lands in said county.

That said tax proceedings were in manner and form in all respects as required by the laws of the State of Montana, and the taxes assessed and levied against the lands described in the bill of complaint herein exceed in amount three thousand dollars ($3,000). That thereafter, the taxes levied as aforesaid upon the lands de-

scribed in the bill of complaint herein remaining unpaid, the treasurer of said county published notice in the manner and form required by the laws of Montana, that he would, on the — day of May, A. D. 1895, sell the said described lands for the taxes, penalties, interest, and costs claimed to be due thereon, and the said
128 treasurer intends to and will sell said lands for said taxes, penalties, interest, and costs unless enjoined and restrained therefrom by the order of the court.

It is further agreed that the sole question desired to be submitted upon the pleadings and this stipulation is whether the lands described in the bill were subject to taxation under the laws of the United States, and of the State of Montana.

Dated this 27 day of June, A. D. 1896.

F. M. DUDLEY,
Solicitor for Complainant.
H. J. HASKELL,
ELLA K. HASKELL,
Solicitors for Defendants.

EXHIBIT "X,"

Being a copy of the assessment-roll of Jefferson county, Montana, for the year 1894.

Railroad Co., Northern Pacific, St. Paul, Minn.

(For tax-list here referred to see pp. 31–49.)

(Endorsed:) Title of court and cause. Stipulation. Filed June 27, 1896. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 9th day of November, 1896, the following further proceedings were had and entered of record herein in the words and figures as follows, to wit:

U. S. Circuit Court, District of Montana, November Term, A. D 1896, in Open Court.

MONDAY, *November* 9, 1896.

129 T. F. OAKES *et al.*, Receivers Nor. Pac. R. R. Co., *vs.* WILLIAM MYERS, Treasurer of Jefferson County, Montana. } No. 365.

Cause ordered set for trial December 2, 1896.

And thereafter, to wit, on the 12th day of November, 1896, a stipulation was filed herein, which said stipulation is in the words and figures as follows, to wit:

In the United States Circuit Court for the District of Montana.

THOMAS F. OAKES, HENRY C. PAYNE, and HENRY C. ROUSE, as Receiver- for the Northern Pacific Railroad Company, Complainants,

vs.

WILLIAM V. MEYER-, Treasurer of Jefferson County, Montana, Defendant.

Stipulation for Substitution.

130 Whereas, the Northern Pacific Railway Company, a corporation created, organized, and existing under and by virtue of the laws of the State of Wisconsin, has purchased all of the properties, assets, and franchises of the Northern Pacific Railroad Company, and succeeded to all claims and demands of said railroad company, of whatsoever kind or nature appertaining to the property described in the complaint herein, and to the management and operation of said property; and,

Whereas, the said Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse have been heretofore discharged as receivers of said Northern Pacific Railroad Company:

Now, therefore, it is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, and by the said Northern Pacific Railway Company, by its solicitors, that the said Northern Pacific Railway Company may be substituted for the said Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, as complainant herein.

CULLEN & TOOLE,
Solicitors for Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company.
H. J. HASKELL,
Solicitor for Defendant.
F. M. DUDLEY,
Solicitor for the Northern Pacific R'y Company.

(Endorsed:) No. 365. In the United States circuit court
131 for the district of Montana. Thomas F. Oakes *et al.*, complainants, *vs.* Wm. V. Meyers, etc. Stipulation. Filed Nov. 12, 1896. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 12th day of November, 1896, the following order was made and entered of record herein in the words and figures as follows, to wit:

In the United States Circuit Court for the District of Montana.

THOMAS F. OAKES, HENRY C. PAYNE, and HENRY C. ROUSE, as Receivers of the Northern Pacific Railroad Company, Complainants,

vs.

WILLIAM V. MYERS, Treasurer of Jefferson County, Montana, Defendant.

Order of Substitution, etc.

On reading and filing the stipulation of the parties hereto, and it appearing unto the court that the said Northern Pacific Railway Company has purchased all the properties, assets, and franchises of the Northern Pacific Railroad Company, and has succeeded to all claims and demands of the said Northern Pacific Railroad
132 Company, of whatsoever kind or nature appertaining to the property described in the complaint herein, and to the management and operation of said property, and that the said Thomas F. Oakes, Henry C. Rouse, and Henry C. Payne have been discharged as receivers of said Northern Pacific Railroad Company:

Now, on motion of the solicitors for the Northern Pacific Railway Company, it is ordered that said Northern Pacific Railway Company be, and it is hereby, substituted as complainant herein in the place and stead of the said Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, and they, the said Oakes, Payne, and Rouse, as such receivers, are hereby released and relieved of all further action on their part in connection with this cause; and it is further ordered that all further proceedings in said cause shall be conducted in the name of the said Northern Pacific Railway Company.

Dated at Helena this 12 day of November, A. D. 1896.

HIRAM KNOWLES, *Judge.*

(Endorsed:) Title of court and cause. Order. Filed and entered Nov. 12, 1896. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 14th day of December, 1896, the following further proceedings were had and entered of record herein in the words and figures as follows, to wit:

133 United States Circuit Court, District of Montana, November Term, A. D. 1896, in Open Court.

MONDAY, *December* 14, 1896.

NORTHERN PACIFIC RAILWAY COMPANY
vs.
WILLIAM MYERS, Treasurer of Jefferson County, Montana. } No. 365.

Order for Decree.

This cause came on regularly for hearing this day upon the pleadings and stipulated facts, F. M. Dudley, Esq., appearing on

behalf of the complainant, and H. J. Haskell, Esq., on part of the defendant, and after argument of counsel, cause taken under consideration by the court, and after due consideration, it is ordered, adjudged, and decreed that complainant is entitled to the relief in and by its bill of complaint prayed, and decree ordered entered in accordance therewith.

And thereafter, to wit, on the 16th day of December, 1896, a final decree was duly filed, passed, and ordered entered herein, which said final decree as entered is in the words and figures as follows, to wit:

134 In the United States Circuit Court for the District of Montana.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant,
vs.
WILLIAM MYERS, Treasurer of Jefferson County, Montana, Defendant.

Final Decree.

This cau e coming on to be heard in open court this 14th day of December, A. D. 1896, at the regular November term thereof, upon the pleadings and stipulated facts; and after hearing counsel it appearing to the court that the complainant is entitled to the relief in and by its bill of complaint prayed, it is ordered, adjudged, and decreed:

1. That the lands described in Schedule "A" hereunto annexed, being the same lands described in the said bill of complaint, were not, nor was any thereof subject to assessment or taxation by the county of Jefferson or State of Montana, in the year 1894.

2. That the attempted assessment of said lands and levy of taxes thereon by said county of Jefferson, its officers or agents, were unauthorized, and were and are null and void.

3. That the said defendant, the treasurer of said Jefferson
135 county, Montana, his deputy and deputies, successor and successors in office, be, and he and they are hereby, forever restrained and enjoined from selling or attempting to sell said lands described in Schedule "A" hereunto annexed, or any thereof, for or on account of said assessments and taxes attempted to be levied thereon by said county of Jefferson, its officers or agents, in and for the year 1894; and are further enjoined and restrained from issuing or causing to be issued any certificate of sale for said lands, or any thereof, or any deeds purporting to convey said lands or any thereof for or on account of said described taxes.

4. That complainant have judgment for its costs and disbursements herein taxed at $——.

Done in open court, at the city of Helena, on this 14th day of December, A. D. 1896, at the regular November term of said court.

HIRAM KNOWLES, *Judge.*

(For tax-list here referred to see pp. 1–49.)

(Endorsed:) Title of court and cause. Decree. Filed and entered Dec. 16, 1896. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 23rd day of December, 1896, the defendant herein filed its bill of exceptions herein, which said bill of exceptions as passed, allowed, signed, and filed is in the words and figures as follows, to wit:

136 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

NORTHERN PACIFIC RAILWAY COMPANY, Complainants,
vs.
WILLIAM MYERS, Treasurer of Jefferson County, Montana, Defendant.

Bill of Exceptions.

Be it remembered that on the 14th day of December, 1896, the same being one of the days of the regular November term of said court, the above cause came on to be heard in said court, F. M. Dudley appearing for the complainant, and Henri J. Haskell appearing for the defendant. That hearing was heard upon the pleadings and stipulated facts, and argument being heard in said cause, and the court being duly advised in the premises, holds:

1. That the lands described in complainant's bill of complaint were not, nor was any thereof, subject to assessment or taxation by the county of Jefferson, State of Montana, in the year 1894.

2. That the attempted assessment of said lands and levy of taxes thereon by said county of Jefferson, its officers, agents, were unauthorized, and are and were null and void.

137 Said court then and there ordered, adjudged, and decreed that the State treasurer of said county of Jefferson, State of Montana, his deputy and deputies, successor and successors in office, be, and he and they are, hereby forever restrained and enjoined from selling or attempting to sell said lands described in the complainant's bill of complaint, or any thereof for or on account of said assessment and taxes attempted to be levied thereon by said county of Jefferson, or its officers and agents in the year 1894, and are further restrained from issuing or causing to be issued any certificate of sale of said lands or any thereof, or any deeds purporting to convey said land or lands for or on account of said described taxes, and that complainant have judgment for its costs and disbursements, which said decree was on the 16th day of December, 1896, filed as a record in said cause, to which said decree and order of the said court the said defendant by his said attorney then and there excepted, and now excepts, for that said decree is contrary to law, and asks that his bill of exceptions be signed and allowed and entered on the record in said cause, which is accordingly done in open court this 23rd day of December, 1896.

HIRAM KNOWLES,
United States District Judge.

(Endorsed:) Title of court and cause. Bill of exceptions. Filed Dec. 23, 1896. Geo. W. Sproule, clerk.

138 And thereafter, to wit, on the 7th day of January, 1897, the defendant herein filed his assignment of errors, which said assignment of errors is in the words and figures as follows, to wit:

Circuit Court of Appeals, Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant and Respondent,
vs.
WILLIAM V. MYERS, Treasurer of Jefferson County, Montana, Defendant and Appellant.

Assignment of Errors.

The appellant hereby assigns the following as errors committed by the court below in the determination of this cause, and the rendition of the decree therein:

1. That although it appears from the pleadings and stipulation of facts that the lands described therein were unsurveyed, odd-numbered sections of land within the place limits of the grant to the Northern Pacific Railway Company by act of Congress, approved July 2, 1864, and which said grant was duly accepted by said Northern Pacific Railroad Company, the court held that said lands were not taxable as the property of the Northern Pacific Railroad Company.

139 2. That although it appears from the pleadings and stipulation of facts that the lands described therein have not been and are not known to be mineral, and at the dates of the grant and of filing the map of definite location in the office of the Commissioner of the General Land Office were not reserved, sold, granted, or otherwise appropriated, and for which there were at said dates no entries or filings or applications to make entries or filings of any kind of record in the United States district land office for the district in which said lands are situated or in the office of the Commissioner of the General Land Office, the court held that said lands were not taxable as the property of the Northern Pacific Railroad Company.

3. That although it appears from the pleadings and stipulation of facts that the lands described therein were included in the list of lands claimed by said Northern Pacific Railroad Company as inuring to it under its grant by virtue of the construction and approval of said railroad, as being vacant, unappropriated, non-interdicted, mineral, or reserved lands of the character contemplated by the grant, in the form prescribed by the Secretary of the Interior, sworn to by the commissioner of lands of said Northern Pacific Railroad Company, filed long prior to the assessment and tax levy complained of with the register and receiver of the United States land office for the district in which said lands are situated, and that the

said Northern Pacific Railroad Company paid to the register and receiver of the United States district land office the fee to which they were entitled by reason of such filing and listing, and that said list- were all approved and certified by the district land
140 office as being correct, and transmitted to the office of the Commissioner of the General Land Office, the court held that said lands were not taxable.

4. That although it appears from the pleadings and stipulation of facts that Congress by an act approved July 10, 1886, declared "that no lands granted to a railroad corporation by act of Congress shall be exempt from taxation by State-, Territories, and municipal corporations on account of the lien of the United States upon the same for costs of surveying, selecting, and conveying the same, or because no patent has been issued therefor, but this provision shall not apply to lands unsurveyed." And that the lands described in the pleadings and stipulation of facts were assessed and the tax levied thereon by the revenue officers of Jefferson county, Montana, in the manner and form prescribed by law, and that said taxes were unpaid, the court held that the said lands were not taxable.

5. That notwithstanding it fully appears from the allegations in the bill of complaint and the stipulation of facts that the Northern Pacific Railroad Company had mortgaged these lands as its property, to the Farmers' Loan and Trust Company, of New York, and in said mortgage the said Northern Pacific Railroad Company claimed to be the owners of said lands, and that said railroad company has such rights, title, interest, and property in and to said lands as was conferred upon it by act of Congress, approved July 2, 1864, the court held that said lands were not taxable as the property of the complainant.

6. The said court held that until said lands have been
141 examined and classified as being non-mineral in character by the United States Government, the Northern Pacific Railroad Company has no title of any kind to any of said lands or any interest, claim, or claims to possession to any of said lands subject to taxation.

7. The said court held that said Northern Pacific Railroad Company had no title of any kind to any of the said lands, nor any interest, claim in or to any of said lands subject to assessment or taxation under the laws of the State of Montana.

8. That although it was stipulated and agreed that the sole question submitted upon the pleadings and stipulation of facts is whether the lands described in the bill were subject to taxation under the laws of the United States, and of the State of Montana, and an order was made and entered of record that in the event the lands described in the bill of complaint herein shall be subject to taxation, the said defendant county treasurer may proceed to enforce the payment of said taxes in the manner provided by law, the said court rendered a final decree restraining and enjoining the defendant, the treasurer of said Jefferson county, Montana, his deputy and deputies, successor and successors in office, from selling

or attempting to sell said lands or any thereof for or on account of said assessment and taxes levied thereon by said Jefferson county.

9. The rendition of a final decree for complainant that said lands were not nor is any part thereof subject to assessment or taxation by the county of Jefferson, State of Montana, in the year 1894, and that the assessment of said lands and the levy of taxes thereon
142 by said county of Jefferson, State of Montana, its officers and agents, were unauthorized, and were and are null and void, and restraining and enjoining the treasurer of said Jefferson county, Montana, his deputy and deputies, successor and successors in office from selling or attempting to sell said lands, or any thereof, for or on account of said assessment and taxes levied thereon by said Jefferson county.

Wherefore, the said William V. Myers prays that the decree of the said circuit court of the United States, ninth circuit, district of Montana, be reversed and the said circuit court of the ninth circuit, for the district of Montana, be ordered to enter a decree dismissing complainant's bill of complaint.

C. B. NOLAN,
Solicitor for Appellant, Helena, Montana.

(Endorsed:) Title of court and cause. Assignment of errors. Filed Jan. 7, 1897. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 7th day of January, 1897, the defendant filed his petition for allowance of appeal, and upon said day said appeal was duly allowed, which said petition and allowance of appeal is in the words and figures as follows, to wit:

143 In the Circuit Court of the United States for the District of Montana.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant and Respondent,
vs.
WILLIAM V. MYERS, Defendant and Appellant.

Petition for Allowance of Appeal.

The above named appellant, William V. Myers, conceiving himself aggrieved by the decree entered on December 16, 1896, in the above-entitled suit, does hereby appeal from said decree to the United States circuit court of appeals for the ninth circuit, and he prays that this his appeal may be allowed, and that a transcript of the records and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States circuit court of appeals for the ninth circuit.

C. B. NOLAN,
Solicitor for Defendant and Appellant, Helena, Montana.

And now, to wit, on January 7, 1897, it is ordered that the appeal be allowed as prayed for.

HIRAM KNOWLES,
United States District Judge.

(Endorsed:) Title of court and cause. Appeal and allow-
144 ance of same. Filed and entered Jan. 7, 1897. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 7th day of January, 1897, the defendant herein filed his bond on appeal, which said bond is in the words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Montana.

NORTHERN PACIFIC RAILWAY COMPANY, Complainant and Respondent,
vs.
WILLIAM V. MYERS, Defendant and Appellant.

Bond on Appeal.

Know all men by these presents, that we, Thomas A. Marlow and A. L. Smith, both of the city of Helena, county of Lewis and Clarke, State of Montana, are held and firmly bound unto the above-named Northern Pacific Railway Company, in the sum of five hundred ($500) dollars to be paid the said Northern Pacific Railway Company, for the payment of which well and truly to be made
145 we bind ourselves, and each of us, our and each of our heirs, executors, administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this seventh day of January, in the year of our Lord, 1897.

Whereas, the above-named defendant, William V. Myers, treasurer of Jefferson county, Montana, has prosecuted an appeal to the United States circuit court of appeals for the ninth circuit to reverse the decree entered in the above-entitled suit by the judge of the circuit court of the United States for the district of Montana.

Now, therefore, the condition of this obligation is such that if the above-named William V. Myers, treasurer of Jefferson county, Montana, shall prosecute said appeal to the effect and answer all damages and costs, if he fails to make his said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THOMAS A. MARLOW.
A. L. SMITH.

STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

Thomas A. Marlow and A. L. Smith, being first duly sworn, each for himself, says that he is a resident and freeholder within the said district of Montana, and worth the amount specified in said undertaking, over and above his just debts and liabilities, exclusive of property exempt from execution.

THOMAS A. MARLOW.
A. L. SMITH.

146 Subscribed and sworn to before me this 7th day of January, 1897.

[SEAL.] EDGAR B. NEWHALL,
Notary Public in and for Lewis and Clarke County, Mont.

Bond approved this seventh day of January, 1897.

HIRAM KNOWLES,
United States District Judge.

(Endorsed:) Title of court and cause. Bond on appeal. Filed Jan. 7, 1897. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 7th day of January, 1897, a citation was duly issued herein, which is hereto annexed:

Citation.

UNITED STATES OF AMERICA, *ss:*

To the Northern Pacific Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the ninth circuit, to be holden at the city of San Francisco, in the State of California, on the sixth day of February, 1897, pursuant to an appeal filed in the clerk's office of the circuit court of the United States, for the district of Montana, wherein William V. Myers, treasurer of Jefferson county, Montana, is appellant, and The Northern Pacific Railway Company is respondent, to show cause, if any there be, why
147 the decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness, the Honorable Hiram Knowles, United States district judge, district of Montana, this 7th day of January, 1897, and of the Independence of the United States the one hundred and twenty-first.

HIRAM KNOWLES,
United States District Judge.

Copy received and service accepted this 7th day of January, 1897.

WILLIAM WALLACE, JR.,
Solicitor for Complainant and Respondent.

(Endorsed:) Filed Jan. 7, 1897. Geo. W. Sproule, clerk. Citation. U. S. circuit court, district of Montana. Nor. Pac. R'y Co. *vs.* Wm. V. Myers, treasurer.

Clerk's Certificate to Transcript.

UNITED STATES OF AMERICA, }
District of Montana, } *ss:*

I, George W. Sproule, clerk of the circuit court of the United States, ninth circuit, district of Montana, do hereby certify and re-

turn to the honorable, the United States circuit court of appeals for the ninth circuit, that the foregoing volume, consisting of 125 pages, numbered consecutively from 1 to 125, inclusive, is a true and complete transcript of the pleadings, process, records, orders, final decree, and other proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said court in
148 said cause; and I further certify and return that I have annexed to said transcript, and included within said paging the original citation.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, in district of Montana, this 29th day of January, in the year of our Lord, one thousand eight hundred and ninety-seven, and of the Independence of the United States, the 121st.

[SEAL.] GEO. W. SPROULE, *Clerk.*

UNITED STATES OF AMERICA, *District of Montana*, } ss:

I, Geo. W. Sproule, clerk of the circuit court of the United States, ninth circuit, district of Montana, do hereby certify that the costs of appeal herein and transcript of record is the sum of $54.65, and that the same has been paid.

Attest my hand and the seal of said court this 29th day of January, 1897.

[SEAL.] GEO. W. SPROULE, *Clerk.*

(Endorsed:) No. 352. In the United States circuit court of appeals for the ninth circuit. William V. Meyers, treasurer of Jefferson county, Montana, appellant, *v.* Northern Pacific Railway Company. Transcript of record. Appeal from the circuit court of the United States for the district of Montana. Filed February 6th, 1897. F. D. Monckton, clerk.

149 In the United States Circuit Court of Appeals for the Ninth Circuit.

WILLIAM V. MYERS, Treasurer of Jefferson County, Montana, Appellant,
v.
NORTHERN PACIFIC RAILWAY COMPANY, Appellee. } No. 352.

Appeal from the circuit court of the United States for the district of Montana.

C. B. Nolan, attorney general State of Montana, for appellant.
C. W. Bunn for appellee.

Before Ross and Morrow, circuit judges, and Hawley, district judge.

HAWLEY, *District Judge:*

This is a suit in equity to enjoin appellant, The Treasurer of Jefferson County, Montana, from selling the lands described in the

bill of complaint for the non-payment of State and county taxes levied in the year 1894. The circuit court granted an injunction, as prayed for in the complaint. The record contains a lengthy stipulation of facts, upon which the case was tried, which
150 may be briefly summarized. The lands in question are surveyed, odd sections within the place limits of the grant to the Northern Pacific Railway Company by act of Congress approved July 2, 1864 (13 Stat., p. 365). The railroad company accepted the terms, conditions, and impositions of this act in due and regular form. It definitely fixed the line of and built its road and earned the grant. Long prior to the assessment and tax levies herein complained of it prepared in the form prescribed by the Secretary of the Interior and filed with the register and receiver of the United States district land office for the district in which said lands were situate lists of lands claimed by the company as inuring to it under its grant, including, among others, the land described in the complaint, and at said time paid the register and receiver of the United States land office the fees to which they were by reason of such listing and filing entitled. The lists were certified to, allowed, and approved by the register and receiver of the local land office. These lists, including the lands described in the complaint, had not at the time of the assessments and tax levies complained of and have not yet been adjusted in the office of the Commissioner of the General Land Office. The various divisions in the Commissioner's office have not yet examined or passed upon said lists, and it has not yet been determined in said office what lands are within the terms of the grant to said company, and none of said described lands have been certified by the Commissioner to the Secretary of the Interior or have been patented by the United States to the railroad company, and the question whether said lands are mineral or non-
151 mineral in character has not yet been determined and is now under investigation under the terms and provisions of the act of Congress approved February 26, 1895, entitled "An act to provide for the examination and classification of certain mineral lands in the States of Montana and Idaho." (28 Stat., p. 683.)

The railroad company has such right, title, interest, and property in and to said lands as is conferred upon it by the act of Congress approved July 2, 1864, and acts and joint resolutions of Congress supplementary thereto and amendatory thereof and no other. The delay, if any, in the identification of the lands is not the result of any action, failure, or default on the part of the railroad company. On November 4, 1895, the Secretary of the Interior suspended the patenting of the lands until the mineral or non-mineral character of the lands selected by the company shall have been investigated and definitely ascertained and adjudicated by proper proceedings and until mineral claimants and the State of Montana shall have opportunity to be heard before the department on questions of law and fact. Under the act of February 26, 1895, three commissioners have been appointed to examine and classify the mineral lands in the Helena land district, including the lands described in the complaint. The commissioners commenced the examination and classi-

fication of lands in said district during the year 1895, and have since continued such examination and classification, and have examined and classified only a small portion of the lands described in the complaint.

In Barden *v.* Northern Pacific Railroad Co., 154 U. S., 288, the court held that by the grant of public lands made to the Northern Pacific Railroad Company by the act of July 2, 1864 (c. 217,
152 13 Stat., 365), all mineral lands other than iron or coal are excluded from its operation, whether known or unknown, and all such mineral lands not otherwise specially provided in the act making the grant are reserved exclusively to the United States, the company having the right to select unoccupied and unappropriated agricultural lands in odd sections nearest to the line of the road in lieu thereof.

The contention of the appellee is that under the general principles announced in that decision the railroad company is excluded by law from the possession of or dominion over the land specified in the grant until it is finally determined by the Government that it is not mineral land.

It is true that the grant is only of non-mineral lands. All mineral lands are by express language "excluded from the operation of this act." Grants of like character have, however, always been construed as being *in præsenti*. In none of them were the mineral lands granted. Mineral lands were always reserved and excepted from the provisions of the grants.

Prior to the decision in the Barden case there had been more or less discussion as to whether or not the railroad grants excluded mineral land which at the time of the passage of the act were not known to be mineral. This question was set at rest by the decision of the court in the Barden case. Mr. Justice Field, speaking for the court, said: "It seems to us as plain as language can make it that the intention of Congress was to exclude from the grant actual mineral land, whether known or unknown, and not merely
153 such as were at the time known to be mineral. After the plaintiff has complied with all the conditions of the grant, performed every duty respecting it, and, among other things, that of definitely fixing the line of the route, its grant was still limited to odd sections which were not mineral at the time of the grant, and also to those which were not reserved, sold, granted, or otherwise appropriated, and were free from pre-emption and other claims or rights at the time the line of the road was definitely fixed, and was coupled with the condition that all mineral lands were excluded from its operation, and that in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd sections, nearest to the line of the road might be selected. There is, in our judgment, a fundamental mistake made by the plaintiff in the consideration of the grant. Mineral lands were not conveyed, but by the grant itself and the subsequent resolution of Congress cited were specifically reserved to the United States and excepted from the operations of the grant. Therefore they were not to be located at all, and if in fact located they could not pass under the grant. Mineral lands

being absolutely reserved from the inception of the grant, Congress further provided that *at the time of the location of the road* other lands should be excepted, viz., those previously sold, reserved, or to which a homestead or pre-emption right had attached."

In that case it was contended that the construction which was finally given to the act by the court would prevent the States and Territories from taxing the property of the company unless
154 they could tax the whole property, mineral as well as agricultural lands.

In reply to this contention the court said: "We do not see why not. The authority to tax the property granted to the company did not give authority to tax the minerals which were not granted. The property could be appraised without including any consideration of the minerals. The value of the property, excluding the minerals, could be as well estimated as its value including them. The property could be taxed for its value to the extent of the title which is of the land."

In Wisconsin Railroad Company *v.* Price County, 133 U. S., 496, upon which appellee principally relies, the court, after declaring that the lands within the original sections named in the grant to the railroad company had become the property of the railroad company, and was therefore taxable, held that the portion of the land taxed which fell within the indemnity lands could not be taxed because no title passed to the company until after the selections were made and until the same were approved by the Secretary of the Interior. Why? Because his action in making the selection was not ministerial, but judicial. "He was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the Government or whether any
155 pre-emption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established; and in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands and determine whether or not any portion of them had been appropriated for any other purpose; and, if so, what portion had been thus appropriated and what portion still remained. This action of the Secretary was required, not merely as supervisory of the action of the agent of the State, but for the protection of the United States against an improper appropriation of their lands. Until the selections were approved, there were no selections, in fact, only preliminary proceedings taken for that purpose, and the indemnity lands remained unaffected in their title. Until then the lands which might be taken as indemnity were incapable of identification."

Here the lands taxed are within the place limits of the grant.

The route of the road had become definitely fixed; the lands granted were susceptible of identification, and the title attached to them and took effect as of the date of the grant, the mineral lands being, as in all of the similar grants to railroad companies, excepted from its provisions. There is no averment, however, in the bill that any of such lands are mineral lands. On the contrary, it is alleged "that said lands and each and every part thereof were, prior to the attempted assessment and tax levies hereinafter referred to,
156 surveyed by the United States or under its authority, and were reported by the surveyors making such surveys to be agricultural lands and non-mineral in character, and as yet, so far as your orators have information, no minerals in quantities sufficient to add to the richness of said lands or to justify expenditure for their extraction by any methods of mining now in use or invented or known to exist have been discovered in said lands."

This state of the facts brings the case within the rule announced in Wisconsin Railroad Company *v.* Price Co., *supra*, as to the lands included in the grant, which were held to be taxable.

We had occasion, in The Northern Pacific Railroad Company *v.* Wright, 54 Fed., 67, to pass upon a similar question, the only substantial difference in the facts so far as the present discussion is involved being that in that case the bill alleged that the Commissioner of the General Land Office had refused to issue patents to the railroad company for the lands granted, because the railroad company had failed and refused to file with the Commissioner affidavits showing the non-mineral character of the land, while in the present case it is admitted that the railroad company and the receivers thereof have been at all times diligent and active in obtaining the adjustment of said grant and in obtaining patents to said company for the granted lands, and have done everything in their means and power to obtain the final adjustment of the grant and to obtain patents for the land described in the complaint. This difference in the facts makes no real distinction in the principles involved in this discussion. In that case substantially the same argument was made as in
157 this. The court, referring to the argument then made, said:

"Counsel for appellant assails the decision rendered by the circuit court and argues at great length from several different standpoints to the effect that the averments of the bill clearly show that all the facts necessary to determine whether the lands in question are within the description contained in the act of Congress have never been ascertained; that they cannot be identified as lands coming within the provisions of the act and have not been seggregated from the public domain; that until such time as they are fully defined and seggregated from the public domain the lands cannot be taxed by the State; that the lands are not taxable until the United States ceases to hold or claim any such interest in them as to justify the withholding of patents therefor; that they are not taxable while there remains any duty unperformed by the United States or its officers of determining the facts upon the existence of which depends appellant's right to have patents issued to it for said

lands; that the determination of such facts is necessarily a condition precedent to the issuance of such patents; that the lands are not taxable until appellant has procured and filed affidavits of their non-mineral character in the Interior Department of the Government, if the officers of that department have any authority to demand such affidavits, and, finally, that the lands are subject to exploration and location as mineral lands, and for this reason are not taxable. In support of this argument counsel cites a
158 vast number of authorities, State and national, including numerous rulings made by the Interior Department. The sum and substance of the entire argument made by counsel is that appellant is the owner of the absolute title to all the lands granted by the act of Congress for every purpose except as to the right of taxation by the States."

In Northern Pacific Railroad Company *v.* Patterson, 154 U. S., 130, 132, the court said: "The ground upon which it was asserted that these lands were not subject to taxation was that they had not been identified as lands passing to the plaintiff under its grant, because the United States had refused to certify them and held them suspended 'for the reason that it is claimed that such lands are mineral and are excepted from the grant to the plaintiff.' It was said in Wisconsin Central Railroad *v.* Price, 133 U. S., 496, 505, that 'He who has the right to property and is not excluded from its enjoyment shall not be permitted to use the legal title of the Government to avoid his just share of State taxation,' and plaintiff does not state whether all or any part of the lands are mineral or non-mineral. If the legal or equitable title to the lands or any of them was in the plaintiff, then it was liable for the taxes on all or some of them, and the mere fact that the title might be in controversy would not appear in itself to furnish sufficient reason why plaintiff should not determine whether the lands or some of them were worth paying taxes on or not."

The court disposed of the case upon other grounds, but the language of the court, as quoted, is indicative of its views upon the question here involved and is sufficiently expressive to justify a reference thereto in support of the right of the State to tax the lands.

159 In Central Pacific Railroad Company *v.* Nevada, 162 U. S., 512, which is distinguishable from this case only upon the ground that there the State had levied the tax upon the possessory claim of the railroad company, while in this case it is claimed that it is not the interest of the company, but the land itself that is assessed; but the identical point here raised was there argued and relied upon by the attorney for the railroad company, and was answered by the court as follows: "It is further claimed that no lands granted to this road can be taxed prior to the issue of the patent, because the grant excluded mineral lands—not only minerals, but mineral lands; that the right and power to ascertain which of the lands are mineral and which non-mineral is vested exclusively in the officers of the Government and can be proved only by the issue of the patent, as held by this court in Barden *v.* Northern Pacific

Railroad Company, 154 U. S., 288. It is argued that if the railroad company paid taxes upon these lands it might never own or acquire them, and the tax would consequently be paid on property it never owned or could own, and that, upon the other hand, if the company should not pay the taxes and the lands be sold under the judgment appealed from, the title to the lands, if the assessments were valid, would pass to the purchaser whether they were mineral or not. * * * It is true that in the Barden case we held that mineral lands were excluded from the operations of the Pacific Railroad land grants whether such minerals were known or unknown at the date of the grant, because the statutes had excepted them in the most unequivocal terms, but nothing was said in that case to impugn the authority of the previous cases which had held that these
160 grants were *in præsenti* of lands to be afterward located. They became so located when they were surveyed. Then the grants attached to them subject to certain specified exceptions, one of which was that mineral should be discovered upon them before the issue of a patent, when as to such lands the title of the company failed. The possibility, however, that minerals might be discovered upon certain sections of these lands, as to which the title of the railroad company might be defeasible, would not impair their title to the great bulk of the grant or enable the company with respect thereto to evade its just obligations to the State. Should the company disclaim a right to the possession of any portion of these lands by reason of the discovery of minerals thereon, there would remain no right to tax them under the statutes of Nevada, but so long as the company asserts a possessory claim to them it implies a corresponding obligation to pay the taxes upon them. State *v.* Central Pacific R. R. Co., 20 Nev., 372."

We have quoted thus extensively from the decisions of the United States courts for the purpose of showing that the questions raised and discussed in this case are neither new or novel. The points raised are precisely the same as were raised in the cases before the decision in the Barden case, and the decision in that case in no manner changes the rulings that had been previously made upon the same identical question. In fact, this is apparent from the language of the court itself in that case, heretofore quoted, in which it is expressly affirmed that, notwithstanding the views expressed as to the character of the grant, it would not in any manner interfere with the right of the State to tax the lands granted to the railroad company.

161 Appellee cites section 3697 of the Political Code of Montana, which provides for the assessment of land in subdivisions and by sections, and argues that such an assessment cannot be construed as an assessment of the interest of the railroad company therein. Section 3700 of the same code provides that the assessor shall ascertain "all property in his county subject to taxation * * * and must assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was at 12 o'clock m. of the first Monday of March next preceding." Section 3670 provides that "all property in this State is subject to tax-

ation," except as provided in section 3671. The lands in question do not come within any of the exceptions mentioned in section 3671, unless it is shown that they are the property of the United States. It is not so shown, unless we indulge in the presumption that they are mineral lands. This we are not authorized to do. All presumptions are directly to the contrary. In favor of taxation is the rule, exemption from taxation the exception.

Hope M. Co. *v.* Kennon, 3 Mon., 35, 37.

The term "property" in the code includes real estate. The term "real estate" includes "the possession of, claim to, ownership of, or right to the possession of land." (Sec. 3680.)

Possession with a claim of ownership is a subject of taxation and imposes on the occupant the duty of paying the tax levied upon the property.

Reily *v.* Lancaster, 39 Cal., 354, 356, and authorities there cited.

The assessment was made in the manner required by law. The regularity of all the acts of the assessing and collecting offi-
162 cers is conceded. There is nothing in any of the statutory provisions of Montana which can fairly be construed as depriving the State of its authority to tax the property as the lands of the railroad company.

In Northern Pacific Railroad Company *v.* McGinnis, 61 N. W., 1032, 1034, the court, in passing upon a similar question, held that if the railroad company was not the owner of the lands and had not sufficient title to support the levy of the assessment, it could not and should not be allowed to question "the legality of the tax." The railroad company cannot complain of any injustice or hardship in being compelled to pay taxes on this land. It has as perfect and complete title thereto, subject only to the exceptions stated in the act, as if it had a patent thereto (as is clearly shown in Wisconsin Company *v.* Price, *supra*), and if any part or portion of the land is to be excluded from the grant because coming within any of the exceptions mentioned in the grant, then, by the express terms of the grant, the railroad company is entitled to select, with the approval of the Secretary of the Interior, an equal quantity of other land in lieu thereof.

The act of February 26, 1895, does not contain any provisions which indicate any intention on the part of Congress to relieve the lands granted from State taxation until such time as it may be finally settled what portions thereof, if any, are mineral lands.

It appears from the pleadings that appellee has executed mortgages upon this land, thereby asserting its ownership therein. It is admitted that it has all the right, title, and interest in the land as conferred upon it by the act of Congress.

163 We are of opinion that the land is taxable. The railroad company, by virtue of its grant, has an indefeasible right or title thereto. The land has become the property of the railroad company in the sense that there is nothing to prevent its use and

enjoyment by the company. It being the beneficial owner of the land and being protected in its use and enjoyment, there is no substantial reason why it should not be compelled to pay taxes thereon. The argument that it may some time in the future be shown that some part thereof is mineral land is too remote, indefinite, and uncertain to be seriously considered by the court as a valid reason for refusing to enforce the right of taxation.

Courts should deal with things as they are without attempting to determine rights upon mere possibilities and speculations. The duty devolved upon the railroad company to affirmatively show that the lands taxed belong to the class which was excluded from its grant. In other words, the burden was upon the railroad company to show that the lands taxed were mineral lands.

State *v.* Central Pacific R. R. Co., 20 Nev., 372, 383.
Northern Pacific R. Co. *v.* McGinnis, 61 N. W., 1032, 1035.

It should not be allowed to blow hot and cold; to say in one breath the lands are not mineral for the purpose of establishing its rights therein, and, in the next breath, to say that the lands may be mineral for the purpose of avoiding the payment of taxes thereon.

164 The judgment and decree of the circuit court is reversed and cause remanded with instructions to dismiss the bill and enter judgment in favor of appellant for his costs.

(Endorsed:) Opinion. Filed Oct. 4, 1897. F. D. Monckton, clerk.

165 United States Circuit Court of Appeals for the Ninth Circuit.

WM. V. MYERS, Treasurer of Jefferson County, Montana, Appellant,
v.
NORTHERN PACIFIC RAILWAY COMPANY, Appellee. } No. 352.

Appeal from the circuit court of the United States for the district of Montana.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Montana and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed, and the cause is remanded to said circuit court with instructions to dismiss the bill and enter judgment in favor of appellant for his costs.

(Endorsed:) Decree. Filed Oct. 4, 1897. F. D. Monckton, clerk.

166 [Endorsed:] No. —. United States circuit court of appeals for the ninth circuit, October term, 189–. Decree. Filed —— —, 189–. —— ——, clerk.

167 In the United States Circuit Court of Appeals for the Ninth Circuit.

WILLIAM V. MYERS, Treasurer of Jefferson County, Montana, Appellant,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Appellee.
} Notice of Appeal.

The above-named Northern Pacific Railway Company, conceiving itself aggrieved by the order entered in said court on the 4th day of October, 1897, reversing the decree of the United States circuit court for the district of Montana, entered in said cause on the 16th day of December, A. D. 1896, doth hereby appeal from said order to the Supreme Court of the United States and prays that this its said appeal may be allowed, and that the transcript of record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

F. M. DUDLEY,
Solicitor for Northern Pacific Railway Co.

Now, to wit, on this 15 day of November, A. D. 1897, it is ordered that the appeal be allowed as prayed for.

WM. W. MORROW,
Circuit Court Judge.

(Endorsed:) Notice of appeal and order allowing same. Filed Nov. 15, 1897. F. D. Monckton, clerk.

168 In the United States Circuit Court of Appeals for the Ninth Circuit.

WILLIAM V. MYERS, Treasurer of Jefferson County, Montana, Appellant,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Appellee.
} Assignment of Errors.

Comes now the above named Northern Pacific Railway Company, by its attorney, and says that in the record and proceedings in the above-entitled cause in said United States circuit court of appeals for the ninth circuit there is manifest error as follows, to wit:

I.

The said court held that the lands described in the bill of complaint in said action were subject to taxation, although it appears from the pleadings and stipulation in said cause:

(*a.*) That said lands were at the time of the assessments and tax levies complained of unpatented, and were involved in contests pending before the Interior Department over questions of fact between said railway company and various settlers and the United States.

(*b.*) Although it further appears from the pleadings and stipula-

tion in said cause that said lands were not at the time of the assessment and tax levies complained of identified and defined as lands passing under the act of Congress approved July 2, 1864, so as to be segregated from the public lands of the United States.

169 (*c.*) Although it further appears from the pleadings and stipulations in said cause that the grantee, under the act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Pugets sound, on the Pacific coast, by the northern route," was not entitled to patents for said lands at the time of the assessment and tax levies complained of.

(*d.*) Although it appears from the pleadings and stipulation in said cause that the United States possessed at the time of the assessment and tax levies complained of an interest in said lands, and each and all thereof, and that the said lands were subject to exploration for minerals as public lands of the United States.

II.

The said court failed and refused to hold that the lands described in the complaint were not at the time of the assessment and tax levy complained of subject to assessment or taxation.

III.

The said court entered an order reversing the decree of the United States circuit court for the district of Montana and remanded said cause with an order to the United States circuit court for the district of Montana to enter a decree in favor of the above-named appellant.

Wherefore the said Northern Pacific Railway Company prays that the decree of the said United States circuit court of appeals for the ninth circuit in the above case heretofore rendered, to wit, October 4th, A. D. 1897, reversing the decree of the United States circuit court for the district of Montana, be reversed, and

170 that the decree heretofore entered in said cause by the United States circuit court for the district of Montana be affirmed.

F. M. DUDLEY,
Solicitor for Appellant.

(Endorsed:) Assignment of errors. Filed Nov. 8, 1897. F. D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

171 In the United States Circuit Court of Appeals for the Ninth Circuit.

WILLIAM V. MYERS, Treasurer of Jefferson County, Montana, Appellant,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Appellee.
} Undertaking.

Know all men by these presents that we, The Northern Pacific Railway Company, as principal, and A. D. Edgar and E. W. Beattie,

both of the city of Helena, county of Lewis & Clarke, State of Montana, as sureties, are held and firmly bound unto the above-named William V. Myers, treasurer of Jefferson county, Montana, in the sum of five hundred dollars, lawful money of the United States, to be paid to the said William V. Myers, treasurer of said Jefferson county; for the payment of which, well and truly to be made, we bind ourselves, each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the eleventh day of November, in the year of our Lord eighteen hundred and ninety-seven.

Whereas the above-named Northern Pacific Railway Company has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judges of the United States circuit court of appeals for the ninth circuit on the fourth day of October, A. D. 1897:

Now, therefore, the condition of this obligation is such that if the above-named Northern Pacific Railway Company shall prosecute said appeal to effect and answer all damages and costs if it fail to make said appeal good, then this obligation shall be void;
172 otherwise the same shall be and remain in full force and virtue.

NORTHERN PACIFIC RAILWAY COMPANY,
By WM. WALLACE, JR.,
Division Counsel.

A. D. EDGAR. [SEAL.]
E. W. BEATTIE. [SEAL.]

Witnesses:
HARRY YAEGER.

STATE OF MONTANA, }
County of Lewis & Clarke. }

A. D. Edgar and E. W. Beattie, being first duly sworn, each for himself says that he is a resident and householder within the county and State aforesaid; that he is worth the amount named in the foregoing obligation as the penal sum therein over and above all his debts and liabilities and exclusive of his property exempt from execution in the State of Montana.

A. D. EDGAR.
E. W. BEATTIE.

Subscribed and sworn to before me this 11th day of November, A. D. 1897.

[SEAL.] HARRY YAEGER,
Notary Public.

The foregoing undertaking and the sureties thereon are each and both approved as sufficient.

Nov. 15, 1897.

WM. W. MORROW, *Judge.*

(Endorsed:) Undertaking on appeal to Supreme Court U.S. Filed Nov. 15, 1897. F. D. Monckton, clerk.

173 United States Circuit Court of Appeals for the Ninth Circuit.

WM. V. MYERS, Treasurer of Jefferson County, Montana, Appellant,
v.
NORTHERN PACIFIC RAILWAY COMPANY, Appellee. } No. 352.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one hundred and seventy-one (171) pages, numbered from one (1) to one hundred and seventy-one (171), both inclusive, to be a true copy of the printed record and of the assignment of errors and of all proceedings in the above-entitled cause, including the opinion filed, as the originals thereof remain of record in said circuit court of appeals, and that the same constitute the transcript on appeal to the Supreme Court of the United States in said cause.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, California, this 26th day of November, A. D. 1897.

F. D. MONCKTON, *Clerk.*

174 UNITED STATES OF AMERICA, *ss:*

The President of the United States to William V. Meyers, treasurer of Jefferson county, Montana, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, on the thirtieth day from the date hereof, pursuant to an order allowing an appeal filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, in that certain cause wherein The Northern Pacific Railway Company is appellant and you, the said William V. Meyers, treasurer of Jefferson county, Montana, is appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said order allowing said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William W. Morrow, United States circuit judge for the ninth circuit, this 15th day of November, A. D. 1897.

WM. W. MORROW,
U. S. Circuit Judge for the Ninth Circuit.

Due service and receipt of copy of the foregoing citation, at Helena, Montana, is hereby acknowledged this 19th day of Nov., 1897.

WILLIAM V. MEYERS,
Treasurer of Jefferson Co., Montana,
By C. B. NOLAN,
Att'y Gen. of the State of Montana and Att'y and Solicitor for said Myers.

B.

175 [Endorsed:] Dock. No. 352. U. S. circuit court of appeals for the ninth circuit. Northern Pacific Railway Co., appellant, *vs.* William V. Meyers, treasurer of Jefferson county, Montana, appellee. Citation. Filed November 23, 1897. F. D. Monckton, clerk U. S. circuit court of appeals, ninth circuit.

Endorsed on cover: Case No. 16,755. U. S. C. C. of appeals, 9th circuit. Term No., 542. The Northern Pacific Railway Company, appellant, *vs.* William V. Myers, treasurer of Jefferson county, Montana. Filed December 20, 1897.

a

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 214.

THE NORTHERN PACIFIC RAILWAY COMPANY, APPELLANT,

vs.

WILLIAM V. MYERS, TREAS'R, &c.

STIPULATION AND ADDITION TO RECORD.

b In the Supreme Court of the United States.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant,
vs.
WILLIAM V. MEYERS, Treasurer of Jefferson County, Montana, Respondent.

Whereas there was attached to and, as "Exhibit X," made a part of the original stipulation of facts, filed in this cause June 27, 1896, in the circuit court of the United States of the 9th circuit in and for the district of Montana, a complete copy of the assessment-roll of Jefferson county, Montana, for the year 1894;

And whereas in the return of the record made by the clerk of the last-named court to the U. S. circuit court of appeals for the 9th circuit the said "Exhibit X" was returned and made a part of and copied in said return in full, at length, and at large, and the record in that form was received and filed in the said court of appeals and was the original record upon which said cause was there heard and determined;

And whereas in making his return of record to the United States Supreme Court the clerk of said court of appeals used a copy of the printed record in said last-named court, which only referred to said "Exhibit X," on page 128 thereof, and by reason thereof the said assessment-roll does not, as it ought to, appear in full or at length or at large as a part of the record in this court, and it is desired to correct this omission:

Now, therefore, it is stipulated between counsel for the appellant and respondent in this cause that the clerk of the said court of ap-

peals may make an additional return of the record in said cause into this court, said additional return to consist of a certified copy of the said assessment-roll, "Exhibit X," and that upon the filing thereof in the office of the clerk of the Supreme Court of the United States the same shall forthwith become and be a part of the record in said cause in said last-named court as fully as if originally returned therein, and may be either inserted in the present printed record in said last-named court or printed as a supplemental record therein, as may be most convenient.

ROB'T B. SMITH &
C. B. NOLAN,
Counsel & Solicitor- for Respondent.
C. W. BUNN &
WM. WALLACE, JR.,
Of Counsel for Appellant.

Dated June 17th, 1898.

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EXHIBIT "X,"

Being a Copy of the Assessment-roll of Jefferson County, Montana, for the Year 1894.

Railroad Co., Northern Pacific, St. Paul, Minn.

Description.	Sec.	Town.	Range.	Area.	Valuation.
		N.	*E.*	*Acres.*	
N. W. ¼ and lots 1, 2, and 5	5	1	1	268.88	537
Lots 4 and 5	7	1	1	60.25	120
All	1	2	1	653.12	197
"	3	2	1	663.04	199
"	5	"	"	658.64	198
"	7	"	"	646.44	194
"	9	"	"	640.	320
"	11	"	"	640.	320
"	15	"	"	640.	320
"	17	"	"	640.	320
"	19	"	"	658.44	198
"	21	"	"	640.	320
N. ½ of N. W. ¼ & lot- 6 & 7.	27	"	"	152.34	304
All	29	"	"	640.	320
"	31	"	"	655.82	197
N. W. ¼ of N. W. ¼ & lots 2, 4, 5, & 8.	33	"	"	198.66	60
All	1	3	1	644.68	194
"	3	"	"	647.24	195
"	5	"	"	639.24	192
"	7	"	"	633.12	190
"	9	"	"	640.	320
"	11	"	"	640.	320
"	13	"	"	640.	320
"	15	"	"	640.	320
"	17	"	"	640.	320
"	19	"	"	632.05	190
"	21	"	"	640.	320
"	23	"	"	640.	320
"	25	"	"	640.	320
"	27	"	"	640.	320
"	29	"	"	640.	320
"	31	"	"	631.23	316

Exhibit "X"—Continued.

Description.	Sec.	Town.	Range.	Area.	Valuation.
		N.	*E.*	*Acres.*	
All	33	3	1	640.	320
"	35	"	"	640.	320
S. ½, S. ½ of N. W. ¼, S. W. ¼ of N. E. ¼, and lots 2, 3, & 4	1	4	1	556.88	1,112
All	9	"	"	640.	640
All	13	"	"	640.	1,280
"	15	"	"	640.	1,280
"	21	"	"	640.	640
S. ½ of N. E. ¼, S. E. ¼ of S. E. ¼ of S. W. ¼	23	"	"	280.	560
2 All	25	"	"	640.	1,280
S. ½ and N. W. ¼ of	27	"	"	480.	960
All	29	4	1	640.	640
"	31	"	"	617.08	319
"	33	"	"	640.	480
"	35	"	"	640.	480
"	1	5	1	639.	192
S. ½ N. E. ¼, N. ½ of N. W. ¼	3	"	"	559.72	168
(S. ½ & N. W. ¼)	5	"	"	481.56	145
N. ½ and E. ½ of S. E. ¼	9	"	"	400.	800
All	11	"	"	640.	1,280
"	13	"	"	640.	640
"	15	"	"	640.	1,280
W. ½, W. ½ of S. E. ¼, S. E. ¼ of S. E. ¼, & N. E. ¼ of N. E. ¼	21	"	"	480.	960
N. ½ S. W. ¼	23	"	"	400.	800
N. W. ¼ and N. W. ¼ of N. E. ¼	27	"	"	200.	400
All	29	"	"	640.	480
"	31	"	"	640.80	480
"	33	"	"	640.	1,260
S. W. ¼ of N. W. ¼, N. W. ¼ of S. W. ¼, and lots 5 and 10	1	7	1	131.08	65
N. E. ¼	11	"	"	160.	80
S. ½ of S. W. ¼ and N. E. ¼ (less 16 acres, R. of way)	13	W.	"	224.	320
N. E. ¼ of N. E. ¼, W. ½ of N. E. ¼, N. W. ¼ of S. E. ¼, and lots 1, 2, 3	11	8	"	248.17	186
N. W. ¼ of S. W. ¼ and lots 1 and 2	25	"	"	89.91	45
W. ½ of W. ½	35	"	"	160.	80
Lot- 1, 2	5	9	1	8.36	5
Lots 8 and 13	5	"	"	.....	(In contest.)
Lots 8 and 9	9	"	"	25 65	8
S. ½ of S. ½, N. W. ¼ of S. W. ¼, S. W. ¼ of N. W. ¼	17	"	"	240.	72
N. ½ of N. W. ¼, S. E. ¼ of N. W. ¼, and N. E. ¼ of S. W. ¼	17	"	"	160.	(In contest.)
N. ½ of S. ½, N. W. ¼, and W. ½ of N. E. ¼	21	"	"	400.	120
E. ½ of N. E. ¼	21	"	"	80.	(Contest.)
S. W. ¼ and S. W. ¼ of S. E. ¼	27	"	"	200.	100
E. ½ of S. E. ¼, N. W. ¼ of S. E. ¼, and N. ½ of N. W. ¼	29	2	"	200.	100
S. E. ¼, S. ½ of S. W. ¼, S. W. ¼ of N. E. ¼, and E. ½ of N. E. ¼	31	"	"	359.77	84
N. W. ¼ of N. E. ¼	31	"	"	40.	(Contest.)
All of	33	"	"	640.	192
Lots 4, 5, and 6	3	2	2	.....	(Contest.)
All	5	"	"	644.88	322
All	7	"	"	617.12	309
N. W. ¼ of N. W. ¼ and lots 1 and 2	9	"	"	118.32	35

Exhibit "X"—Continued.

Description.	Sec.	Town.	Range.	Area.	Valuation.
		N.	*E.*	*Acres.*	
Lots 3, 4, and 5	17	2	2	77.09	115
Lots 4, 5, 8, and 9	1	3	2	191.99	384
All	11	"	"	639.74	320
W. ½ and S. W. ¼ and lots 2, 3, 4, 7, and 8	13	"	"	226.95	452
3 All	21	3	2	640.	320
Fract. N. ½, N. ½ of S. E. ¼, and lots 3, 6, and 7	23	"	"	480.05	360
W. ½ of W. ½ and lots 2, 3, 5, and 8	27	"	"	249.92	125
All of	33	3	2	640.	320
"	7	5	2	631.96	1,262
Lots 2 and 6	9	"	"	38.03	19
S. ½ of S. W. ¼ and lots 4, 5, and 6	15	"	"	144.38	288
W. ½ of S. W. ¼, S. E. ¼ of S. W. ¼, and S. W. ¼ of S. E. ¼, N. ½ of N. E. ¼, S. E. ¼ of N. E. ¼, and N. E. ¼ of S. E. ¼	21	"	"	320.	320
All of	27	"	"	640.	1,280
N. ½	29	"	"	320.	320
N. ½ of N. E. ¼	31	"	"	80.	80
All of	33	"	"	640.	1,280
N. W. ¼ of N. W. ¼, S. ½ of N. ½, S. ½, and lots 2, 3, 4	35	"	"	583.86	1,168
E. ½ of S. W. ¼ and lots 1, 2, 3, 4, 5, 6, 7, and 8	7	6	2	349.42	175
W. ½ of S. W. ¼, S. E. ¼ of S. W. ¼, lots 4, 5, 6, and 9	17	"	"	243.48	122
All	19	"	"	639.04	320
Lot 3	21	"	"	.....	(Contest.)
W. ½ and W. ½ of S. E. ¼	29	"	"	400.	200
Lot 3	27	"	"	2.13	1
All	31	"	"	644.19	322
Lots 2, 4, 5, 6, 7, 10, 11, 12, and 13	19	7	2	256.12	128
Lot 4	31	8	2	16.14	32
			W.		
All	1	1	1	643.	193
"	3	"	"	636.20	190
"	5	"	"	647.	204
"	7	"	"	627.83	188
"	9	"	"	640.	320
"	11	"	"	640.	320
"	15	"	"	640.	320
"	17	"	"	640.	320
"	19	"	"	633.22	190
"	21	"	"	640.	320
W. ½ of	27	"	"	320.	160
N. ½ of	29	"	"	320.	160
N. E. ¼ and N. E. ¼ of N. W. ¼	33	"	"	240.	120
All	1	2	1	636.36	191
"	3	"	"	633.13	190
"	5	"	"	640 66	192
"	7	"	"	615.79	185
"	9	"	"	640.	320
"	11	"	"	640.	320
"	13	"	"	640.	320
"	15	"	"	640.	320
"	17	"	"	640.	320
"	19	"	"	618.82	309
"	21	"	"	640.	320
N. ½, S. W. ¼, and N. ½ of S. E. ¼	23	"	"	560.	320

Exhibit "X"—Continued.

Description.	Sec.	Town.	Range.	Area.	Valuation.
		N.	*W.*	*Acres.*	
All	25	2	1	640.	320
4 All	27	2	1	640.	320
"	29	"	"	640.	320
All	31	"	"	618.68	309
"	33	2	1	640.	320
"	35	2	1	640.	320
"	1	3	1	643.80	322
"	3	"	"	651.76	326
"	5	"	"	643.70	322
"	7	"	"	609.67	305
"	9	"	"	640.	320
"	11	"	"	640.	320
"	13	"	"	640.	320
"	15	"	"	640.	320
"	17	"	"	640.	320
"	19	"	"	604.44	302
"	21	"	"	640.	320
"	23	"	"	640.	320
"	25	"	"	640.	320
"	27	"	"	640.	320
"	29	"	"	640.	320
"	31	"	"	601.67	302
"	33	"	"	640.	320
"	35	"	"	640.	320
"	1	4	1	624.38	188
"	3	"	"	613.02	184
"	5	"	"	600.90	180
"	7	"	"	590.80	180
"	9	"	"	640.	192
		N.	*W.*		
"	11	4	1	640.	192
"	13	"	"	640.	320
"	15	"	"	640.	480
All except mineral survey- #3179, 3180, 3181, 3429, 3430, 3459	17	"	"	481.97	240
All	19	"	"	592.	296
"	21	"	"	640.	480
"	23	"	"	640.	480
"	25	"	"	640.	480
"	27	"	"	640.	320
"	29	"	"	640.	480
"	31	"	"	585.12	297
"	33	"	"	640.	320
"	35	"	"	640.	480
All, less 16.17 acres R. way	1	8	1	626.49	313
E. ½ and E. ½ of W. ½ and lot 4	3	"	"	528.	1,056
All	11	"	"	640.	480
N. ½	13	"	"	320.	(Contest.)
N. E. ¼ of	15	"	"	160.	80
S. W. ¼ of S. W. ¼	5	9	1	40.	40
E. ½ and E. ½ of N. W. ¼	9	"	"	400.	200
S. W. ¼	15	"	"	160.	80
N. ½ S. E. ¼, E. ½ S. W. ¼, less 23 acres R. of way	21	"	"	537.	268
N. E. ¼ of S. W. ¼	23	"	"	40.	20
S. E. ¼	23	"	"	.....	(Contest.)
5 N. E. ¼ and E. ½ of S. E. ¼, E. ½ of N. W. ¼ and N. ½ S. W. ¼, less 10 acres R. of way	27	9	1	390.	195
All	1	2	2	636.95	191

Exhibit "X"—Continued.

Description.	Sec.	Town.	Range.	Area.	Valuation.
		N.	*W.*	*Acres.*	
All	3	2	2	633.49	190
"	5	"	"	638.18	192
E. ½, E. ½ of N. W. ¼, and S. W. ¼	7	"	"	556.89	168
All	9	"	"	640.	320
"	11	"	"	640.	320
"	13	"	"	640.	192
"	15	"	"	640.	320
E. ½ of E. ½, W. ½ N. E. ¼, E. ½ of N. W. ¼, N. W. ¼ of N. W. ¼, and N. W. ¼ of S. E. ¼	17	"	"	400.	200
W. ½	19	"	"	312.90	94
All	21	"	"	640.	320
"	23	"	"	640.	320
"	25	"	"	640.	192
"	27	"	"	640.	192
E. ½ and E. ½ of S. W. ¼	29	"	"	400.	200
S. ½ N. W. ¼ & S. W. ¼ of *N. E.*	31	"	"	512.18	256
All	33	"	"	640.	320
"	35	"	"	640.	320
N. E. ¼, E. ½ S. E. ¼, and N. E. ¼ of N. W. ¼	1	3	2	279.42	140
N. W. ¼ of N. E. ¼, N. W. ¼, N. W. ¼ ¼ of S. W. ¼	3	"	"	248.40	124
E. ½ of S. E. ¼	5	"	"	80.	160
All	7	"	"	626.20	313
"	9	"	"	640.	192
N. ½, N. ½ of S. W. ¼, S. W. ¼ of S. W. ¼, & S. E. ¼ S. E. ¼	17	"	"	480.	160
All	19	"	"	629.18	629
"	21	"	"	640.	320
E. ½, E. ½ of N. W. ¼, S. W. ¼ of N. W. ¼, and S. W. ¼	25	"	"	600.	300
All	29	"	"	640.	320
E. ½, E. ½ N. W. ¼, & S. W. ¼	29	"	"	560.	280
N. W. ¼ of N. E. ¼	31	"	"	40.	80
All	33	"	"	640.	480
"	35	"	"	640.	480
"	1	4	2	573.48	172
"	3	"	"	557.45	167
"	5	"	"	556.95	168
"	7	"	"	634.17	317
"	9	"	"	640.	320
"	11	"	"	640.	480
"	13	"	"	640.	320
"	15	"	"	640.	320
"	17	"	"	640.	480
N. ½ S. W. ¼ & W. ½ S. E. ¼	21	"	"	560.	280
All	23	"	"	640.	480
"	25	"	"	640.	480
E. ½ & S. W. ¼	27	"	"	480.	360
6 N. W. ¼, except mineral survey # 2934	27	4	2	159.40	120
E. ½ & N. W. ¼ & E. ½ S. W. ¼	29	"	"	560.	1,120
W. ½ S. E. ¼, S. E. ¼ of N. E. ¼, and W. ½ of N. E. ¼	31	"	"	583.	1,166
All	33	"	"	640.	480
"	35	"	"	640.	320
N. E. ¼ of N. E. ¼, W. ½ N. E. ¼, N. W. ¼, W. ½ of S. W. ¼, and N. E. ¼ S. W. ¼	1	1	3	400.	129

Exhibit "X"—Continued.

Description.	Sec.	Town.	Range.	Area.	Valuation.
		N.	*W.*	*Acres.*	
S. ½ of N. E. ¼ & N. ½ of S. E. ¼....	5	1	3	160.	50
N. ½ of S. E. ¼ & W. ½ of N. E. ¼ and N. ½ of S. W. ¼	9	1	3	240.	120
N. ½ of N. E. ¼.....	11	"	"	80.	40
All.....	1	2	3	641.60	193
"	3	"	"	646.25	193
Lot 1.....	5	"	"	41.40	21
All.....	9	"	"	640.	320
"	11	"	"	640.	192
E. ½ of N. E. ¼, S. W. ¼ of N. E. ¼, N. E. ¼ of N. W. ¼, W. ½ of N. W. ¼ & N. W. ¼ of S. W. ¼, and S. E. ¼.....	13	"	"	440.	220
N. W. ¼ of N. E. ¼, S. E. ¼ of N. W. ¼, N. E. ¼ of S. W. ¼, & S. ½ of S. W. ¼.....	13	"	"	.....	(Contest.)
All.....	15	"	"	640.	192
S. E. ¼ of N. E. ¼, S. W. ¼ of S. E. ¼, and E. ½ of S. E. ¼.....	17	"	"	160.	80
All.....	21	"	"	640.	192
W. ½ and S. W. ¼ of S. E. ¼.....	23	"	"	360.	180
S. E. ¼ of N. E. ¼, N. ½ of S. E. ¼, & S. E. ¼ of S. E. ¼..	23	"	"	.....	.....
All.....	25	"	"	640.	192
"	27	"	"	640.	320
N. ½	29	"	"	320.	192
S. W. ¼ and S. E. ¼ of N. W. ¼....	31	"	"	213.60	107
All.....	33	"	"	640.	640
N. ½, N. ½ of S. ½, S. W. ¼ of S. W. ¼ of S. E. ¼ of S. E. ¼.	35	"	"	560.	1,120
All.....	1	3	3	641.18	322
E. ½.....	3	"	"	322.16	61
All.....	11	"	"	640.	192
"	13	"	"	640.	320
"	15	"	"	640.	192
"	21	"	"	640.	480
"	23	"	"	640.	320
"	25	"	"	640.	192
"	27	"	"	640.	320
"	33	"	"	640.	320
"	35	"	"	640.	320
N. ½ & S. E. ¼.....	1	4	3	464.74	928
S. W. ¼.....	3	"	"	160.	320
All..	5	"	"	625.69	312
7 N. E. ¼ of N. E. ¼.....	7	4	3	40.	20
All.....	9	"	"	640.	320
All	15	"	"	640.	1,280
E. ½ of N. E. ¼.....	17	"	"	80.	80
All.....	23	"	"	640.	480
"	25	"	"	640.	1,260
"	27	"	"	640.	480
"	35	"	"	640.	480
"	1	5	3	642.48	321
E. ½.....	3	"	"	307.29	154
"	9	"	"	640.	320
"	11	"	"	640.	320
"	13	"	"	640.	480
E. ½ of N. E. ¼ & S. E. ¼..	15	"	"	240.	120
W. ½ of N. E. ¼, less 7 acres R. of way.....	15	"	"	.....	(Contest.)

Exhibit "X"—Continued.

Description.	Sec.	Town.	Range.	Area.	Valuation.
		N.	*W.*	*Acres.*	
N. E. ¼ (less 6 acres R. of way)....	19	5	3	154.	80
All..	23	"	"	640.	1,280
"	25	"	"	640.	640
S. W. ¼ of N. W. ¼ & W. ½ of S. W. ¼.	29	"	"	120.	240
All	31	"	"	637.99	319
"	5	7	3	641.80	322
W. ½, W. ½ of S. E. ¼, S. E. ¼ of S. E. ¼ (less 15 acres R. of way)..	7	"	"	411.	305
S. ½ of N. W ¼ & N. W. ¼ of S. W. ¼.	17	"	"	120.	60
N. W. ¼ of N. E. ¼ & N. ½ of N. W. ¼ (less 20.60 acres R. of way).....	17	"	"	99.34	50
N. W. ¼ of N. E. ¼, N. W. ¼ ¼, & lot 3.....	19	"	"	229.42	115
All.....	1	8	3	772.16	386
E. ½, E. ½ of N. W. ¼, N. ½ of S. W. ¼, & lots 5 & 6.....	3	"	"	657.72	329
All.....	5	"	"	.....	(Contest.)
N. ½, N. W. ¼ of S. W. ¼, & S. E. ¼.	7	"	"	538.08	270
E. ½ of S. W. ¼ & S. W. ¼ of S. W. ¼.	7	"	"	.....	(Contest.)
S. E. ¼ of S. E. ¼, S. W. ¼ of N. W. ¼, W. ½ of S. W. ¼, S. E. ¼ of S. W. ¼.....	9	"	"	200.	100
E. ½ of N. E. ¼, N. ½ of N. W. ¼ of N. E. ¼, N. ½ of S. ½ of N. W. ¼ of N. E. ¼, N. ½ of N. E. ¼ of N. W. ¼, N. ½ of S. ½ of N. E. ¼ of N. W. ¼, N. W. ¼ of N. W. ¼, W. ½ of S. E. ¼ of N. W. ¼, N. E. ¼ of S. W. ¼, N. E. ¼ of S. E. ¼, N. E. ¼ of N. W. ¼ of S. E. ¼, S. ½ of N. W. ¼ of S. E. ¼, S. W. ¼ of S. E. ¼.....	9	"	"	.....	(Contest.)
All.....	11	"	"	616.	320
All.....	13	"	"	640.	480
8 E. ½ of E. ½, W. ½ of N. E. ¼, E. ½ of N. W. ¼, N. W. ¼ of N. W. ¼, N. W. ¼ of S. E. ¼, S. W. ¼ of S. W. ¼.....	15	8	3	440.	220
N. ½ of S. W. ¼ of N. W. ¼, S. E. ¼ of S. W. ¼ of N. W. ¼.....	15	"	"	.....	(Contest.)
All.....	17	"	"	640.	320
"	19	"	"	o25.52	313
E. ½ & E. ½ of S. W. ¼	21	"	"	400.	200
S. ½, N. W. ¼, W. ½ of N. E. ¼, and S. E. ¼ of N. E. ¼.....	23	"	"	600.	300
N. E. ¼ of N. E. ¼.....	23	"	"	.....	(Contest.)
		N.	*W.*		
All.....	25	8	3	640.	320
"	27	"	"	640.	320
N. W. ¼, N. ½ of S. W. ¼ and S. W. ¼ of S. W. ¼, & W. ½ of N. E. ¼..	29	"	"	360.	180
S. E. ¼ of S. W. ¼, S. ½ of S. E. ¼ (less 12 acres R. of way).....	29	"	"	.....	(Contest.)
N. E. ¼ of N. E. ¼, W. ½ of N. E. ¼, & W. ½.....	31	"	"	423.65	212
S. E. ¼ of N. E. ¼, N. ½ S. E. ¼, S. W. ¼ of S. E. ¼, W. ½ of W. ½ of S. E. ¼ of S. E. ¼, & E. ½ of S. E. ¼ of S. E. ¼ (less 12 acres R. of way).....	31	"	"	.....	(Contest.)

Exhibit "X"—Continued.

Description.	Sec.	Town.	Range.	Area.	Valuation.
		N.	*W.*	*Acres.*	
All	33	8	3	640.	320
"	35	"	"	640.	320
		S.			
Lot 3	7	1	4	33.30	17
E. ½ of N. W. ¼	7	"	"	.....	(Contest)
		N.			
All that part north of Jefferson river (less 6 acres right of way)	1	1	4	271.95	554
E. ½ of N. W. ¼ (less 6 acres R. of way)	3	"	"	33.85	68
S. ½ of N. W. ¼ (less 12 acres R. of way)	3	"	"	.....	(Contest.)
S. ½ of N. W. ¼, S. ½, and lot 3 (less 6 acres R. way)	5	"	"	438.87	878
All	7	"	"	635.17	635
N. E. — of N. E. ¼ & E. ½ of S. E. ¼	9	"	"	.....	(Contest.)
N. E. ¼ of N. W. ¼ & lots 1 & 2	19	"	"	120.36	120
S. E. ¼ of N. W. ¼	19	"	"	....	(Contest.)
S. E. ¼ of	29	"	"	160.	80
W. ½ of N. E. ¼, W. ½, & lot 1	1	2	4	440.79	220
All	3	"	"	641.54	192
"	5	"	"	645.47	193
"	7	"	"	559.84	168
E. ½ of S. E. ¼ & S. W. ¼ of S. E. ¼	9	"	"	120.	60
All	11	"	"	640.	320
S. W. ¼ of N. E. ¼, W. ½, & S. E. ¼	13	"	"	.....	(Contest.)
9 All	15	2	4	640.	320
N. ½, S. W. ¼, & W. ½ of S. E. ¼	17	"	"	560.	280
All	19	"	"	564.44	170
E. ½, E. ½ of N. W. ¼, & S. W. ¼ of N. W. ¼	21	"	"	440.	220
All	23	"	"	640.	320
"	27	"	"	640.	480
"	29	"	"	640.	480
N. ½ & N. ½ of S. ½ & S. ½ of S. E. ¼ (less 10 acres R. of way)	31	"	"	498.05	372
W. ½, W. ½ of N. E. ¼ & N. W. ¼ of S. E. ¼, & S. ½ of S. E. ¼	33	"	"	520.	260
E. ½ of N. E. ¼ & N. E. ¼ of S. E. ¼	33	"	"	.....	(Contest.)
W. ½ & S. E. ¼ of	35	"	"	480.	960
All	3	3	4	641.86	320
"	5	"	"	645.02	322
E. ½, E. ½ of N. W. ¼, N. E. ¼ of S. W. ¼, & N. W. ¼ of N. W. ¼	7	"	"	480.	240
All	9	"	"	640.	1,280
"	15	"	"	640.	480
"	17	"	"	640.	480
S. E. ¼ of N. E. ¼, E. ½ of S. E. ¼, S. W. ¼ of S. E. ¼	19	"	"	160.	80
E. ½	21	"	"	320.	160
W. ½	27	"	"	320.	160
All	29	"	"	640.	320
E. ½, S. E. ¼ of N. W. ¼, E. ½ of S. W. ¼, S. W. ¼ of S. W. ¼	31	"	"	461.	231
E. ½, E. ½ of W. ½, S. W. ¼ of S. W. ¼	33	"	"	520.	260
S. W. ¼ of N. E. ¼, S. ½ of N. W. ¼, W. ½ of S. W. ¼, & lots 1, 2, and 3	3	4	4	242.	121
All	5	"	"	534.05	161
E. ½, E. ½ of W. ½, & lots 1, 2, and 3	7	"	"	601.80	180

Exhibit "X"—Continued.

Description.	Sec.	Town.	Range.	Area.	Valuation.
		N.	*W.*	*Acres.*	
All	9	4	4	640.	192
W. ½ of	17	"	"	320.	160
E. ½ of N. E. ¼ & E. ½ of S. E. ¼	17	"	"	.....	(Contest.)
All	19	"	"	640.	320
"	21	"	"	640.	320
"	27	"	"	640.	320
"	29	"	"	640.	320
"	31	"	"	640.	320
N. E. ¼, W. ½ of N. W. ¼	33	"	"	200.	100
E. ½ of N. W. ¼, N. E. ¼ of S. W. ¼, N. W. ¼ of S. E. ¼	33	"	"	.....	(Contest.)
S. W. ¼ of N. W. ¼, W. ½ of S. W. ¼, S. E. ¼ of S. W. ¼	35	"	"	160.	80
E. ½ of S. E. ¼ & S. W. ¼ of S. E. ¼	3	5	4	120.	240
E. ½ of N. W. ¼, N. W. ¼ of N. W. ¼	13	5	4	120.	240
N. ½ & S. E. ¼ (less 6 acres R. of way)	9	6	4	474.	2,400
All	11	"	"	640.	3,200
"	13	"	"	640.	3,200
S. ½ of N. W. ¼ & S. ½ of S. E. ¼ & lots 1, 2, 3, and 4	1	7	4	319.12	320
N. W. ¼ & S. ½ of S. E. ¼, N. E. ¼ of S. E. ¼, & W. ½ of S. W. ¼	11	"	"	360.	360
N. ½ (less 8 acres R. of W.)	13	"	"	312.	320
		S.			
E. ½ N. W. ¼ & E. ½ of S. W. ¼	1	1	5	510.92	1,020
All	3	"	"	594.82	297
S. W. ¼ of N. W. ¼, W. ½ of S. W. ¼, & S. E. ¼ of S. W. ¼	15	4	4	160.	80
All	5	1	5	591.16	296
All that part north of Fish creek	9	"	"	200.	400
N. W. ¼ of N. E. ¼, N. ½ of N. W. ¼	11	"	"	120.	400
		N.			
All	1	1	5	635.	318
"	3	"	"	637.48	318
E. ½ of	9	"	"	320.	160
All	11	1	5	640.	320
"	13	"	"	640.	320
"	15	"	"	640.	320
E. ½	17	"	"	320.	160
All	21	"	"	640.	320
"	23	"	"	640.	320
"	25	"	"	640.	320
"	27	"	"	640.	320
"	29	"	"	640.	320
E. ½	31	"	"	320.	160
All	33	"	"	640.	320
"	35	"	"	640.	320
"	1	2	5	644.	322
"	11	"	"	640.	320
"	13	"	"	640.	320
"	15	"	"	640.	320
"	23	"	"	640.	480
"	25	"	"	640.	480
E. ½, N. ½ of N. W. ¼, & W. ½ of S. W. ¼ (less 20 acres right of way)	35	"	"	460.	345
N. ½	1	4	7	314.	157
S. E. ¼ of S. E. ¼	11	4	7	40.	40

Exhibit "X"—Continued.

Description.	Sec.	Town.	Range.	Area.	Valuation.
		N.	*W.*	*Acres.*	
All	13	4	7	640.	1,280
E. ½	23	"	"	320.	320
N. W. ¼ of N. W. ¼	25	"	"	40.	40
W. ½	35	"	"	320.	640
All	1	5	8	636.08	192
All	11	"	"	640.	192
11 All	13	5	8	640.	192
N. ½ of N. E. ¼	23	"	"	80.	25
All	1	6	8	629.58	192
N. E. ¼ & E. ½ of S. E. ¼	11	"	"	240.	72
All	13	"	"	640.	192
E. ½ of N. E. ¼ & S. E. ¼	23	"	"	240.	75
All	25	"	"	640.	192
S. E. ¼	27	"	"	168.	48
All	35	"	"	640.	192
Total valuation					139,959
Added to *cual* ass. of 1893					16,417
Total					156,376

United States Circuit Court of Appeals for the Ninth Circuit.

WILLIAM V. MYERS, Treasurer of Jefferson County, Montana, Appellant,
v.
THE NORTHERN PACIFIC RAILWAY COMPANY, Appellee. } No. 352.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing eleven pages, numbered from one to eleven, inclusive, to be a full, true, and correct copy of Exhibit "X," being a copy of the assessment roll of Jefferson county, Montana, for the year 1894, as the same appears and remains of record in my office as a part of the original certified transcript of record in the above-entitled cause upon appeal from the circuit court of the United States for the district of Montana.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 18th day of June, 1898.

Seal United States Circuit Court of Appeals, Ninth Circuit.

F. D. MONCKTON, *Clerk.*

[Endorsed:] Case No. 16,755. Supreme Court U. S., October term, 1898. Term No., 214. The Northern Pacific Railway Co., app't, *vs.* Wm. V. Myers, treas'r, &c. Stipulation and addition to record. Filed July 15, 1898.

In the

Supreme

THE NORTHERN

WILLIAM T. [illegible], [illegible] OF
[illegible] COUNTY, MONTANA,

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR APPELLANT.

C. W. BUNN,
of Counsel.

Argus Printing Company, Book and Job Printers,
First Union Block, St. Paul.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

THE NORTHERN PACIFIC RAILWAY COMPANY,
Appellant,

vs.

WILLIAM V. MYERS, TREASURER OF JEFFERSON COUNTY, MONTANA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR APPELLANT.

STATEMENT.

This suit involves the validity of a tax levied under the laws of the State of Montana against unpatented place lands lying within the grant to the Northern Pacific Railroad Company made by the Act of Congress approved July 2, 1864.

The case comes to this court on appeal from the decree of the Circuit Court of Appeals of the Ninth Circuit. The appellant, Northern Pacific *Railway* Company, being a corporation organized under the laws of Wisconsin and not a federal corporation, the ground on which rests the jurisdiction of this court should be explained.

The suit was brought in the Circuit Court of the United States for the District of Montana by Oakes, Payne and Rouse, as Receivers of the Northern Pacific *Railroad* Company, which was a federal corporation, the said Receivers being appointed moreover by a decree of the federal court. (Transcript, p. 1 to 15. p. 27 to 31).

The suit proceeded in the Circuit Court in the name of said Receivers to a hearing on demurrer and to a submission of the case upon bill, answer and stipulated facts. (Transcript, p. 34 to 54.) On the twelfth of November, 1896, it was stipulated and represented to the Court that the Northern Pacific *Railway* Company had purchased the property in question pending the litigation, and it was agreed and thereupon ordered by the Court that the Northern Pacific *Railway* Company be substituted as plaintiff in place of the Receivers. Thereupon a decree was passed on the sixteenth day of December in favor of the complainant enjoining the enforcement and collection of the taxes. From this decree the defendant William Myers, County Treasurer, appealed to the Circuit Court of Appeals which reversed the decree of the Circut Court. *Myers* vs. *Northern P. Ry. Co.*, 48 U. S. A. 620. The plaintiff Railway Company takes this appeal.

It thus appears that the jurisdiction of the Circuit Court over this case rested, not on citizenship, but on the federal question involved. The Circuit Court of Appeals' act of March 3, 1891, Sec. 6, provides that the judgments or decrees of the Circuit Court of Appeals shall be final in all cases, in which the jurisdiction of the Circut Court is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states. Therefore this is not one of the cases in which the jurisdiction of the Circuit Court of Appeals is final. The transfer of title pending the suit did not affect the jurisdiction of the Circuit Court which had already attached. *Mollan* vs. *Torrance*, 9 Wheat. 537; *Dunn* vs. *Clarke*, 8 Pet. 1; *Morgan* vs. *Morgan*, 2 Wheat. 290; *Conolly* vs. *Taylor*, 2 Pet. 556; *Clarke* vs. *Mathewson*, 12 Pet. 164; *Whyte* vs. *Gibbes*, 20 How. 541; *Judge Curtis on Federal Jurisdiction*. p. 121. The jurisdiction of this court, depending on the character of the jurisdiction of the Circuit Court, cannot consequently be affected by a transfer of interest pending litigation after the jurisdiction of the Circuit Court had once attached on the ground of a federal question.

The case as before stated, was determined in the

Circuit Court on the pleadings and an agreed statement of facts. The agreed statement contains all the essential facts and is printed in the transcript, p. 54 to 67.

The Northern Pacific grant did not pass mineral lands to the Company. Sec. 3 of the Act of July 2, 1864, incorporating the Northern Pacific Railroad Company, grants to said company, its successors and assigns, "every alternate section of public land, *not mineral*, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line," etc.

This section also contains the following proviso:

> "*Provided further*, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections nearest to the line of said road, may be selected as above provided; and *Provided, further*, that the word 'mineral' when it occurs in this act, shall not be held to include iron or coal."

It is to be noted in passing that mineral lands are not conveyed by the grant any more than even sections are conveyed.

The lands described in the complaint lie within the place limits of the grant within the state of Montana. The railroad was located and constructed opposite these lands prior to the year 1888. That portion of the road opposite the lands in question was definitely located prior to July 6, 1882. (Transcript, p. 56.)

At the date of the grant and at the date of definite location the lands in question were not reserved, sold, granted or otherwise appropriated, and there were no filings or entries in the Land Office standing against the same. They were surveyed prior to the assessment complained of and were returned in the surveys as non-mineral in character. (Transcript, p. 56, 57.)

The Land Commissioner of the Railroad Company in January, 1887, filed the usual application in the local land office claiming the lands described in the complaint for the Company, and in 1892 the local land office approved

the list and forwarded it to the Commissionerof the General Land Office. (Transcript, p. 57.)

In the usual course such lists are, upon their receipt in the office of the Commissioner of the General Land Office, transmitted to the railroad division to be examined, for the purpose of determining whether they are within the limits of the grant and whether the conditions of the grant have been complied with by the Railroad Company. They are thereafter transmitted to the different divisions, including the mineral land division, for determination as to whether they fall within exceptions from the grant. After the lands which pass under the grant are so ascertained and all exceptions eliminated, a clear list is made and approved by the Commissioner of the General Land Office and certified to the Secretary of the Interior for his approval. Such lands are not patented to the Company until such clear lists are approved by the Secretary. The lists, including the lands in question, had not at the time of the assessment complained of and had not at the time of the commencement of this suit, been adjusted in the office of the Commissioner of the General Land Office. The various divisions of that office had not, when the suit was commenced, examined and passed upon said list or determined what lands were within the grant to the Company and what were not. None of said lands had been certified by the Commissioner to the Secretary of the Interior as being lands passing under the grant, and none of them had been patented. (Transcript, p. 58, 59.)

The Railroad Company had no interest in or title to the lands except as conferred by said grant. (Transcript, p. 59.)

On November 4, 1889, Secretary Noble suspended the patenting of lands in Montana to the Northern Pacific Company "until the mineral or non-mineral character of the lands selected by said company had been investigated and definitely ascertained and adjudicated by proper proceedings." (Transcript, p. 59, 60.)

The taxes complained of were assessed in the year

1894, and Secretary Noble's order of suspension was not revoked prior to 1895. (Transcript, p. 60.)

The Railroad Company and the Receivers thereof have been at all times diligent and active in obtaining the adjustment of the grant, and the non-identification of lands coming under the grant is in no way due to its, or their action, or non-action. (Transcript, p. 60.)

Under the Act of Congress of February 26, 1895, Stats. at Large, Vol. 28, p. 683, three commissioners have been appointed to examine and classify the mineral lands in the Helena land district including the lands described in the complaint. The question whether said lands are mineral or non-mineral in character is now under investigation under the terms and provisions of said Act. (Transcript, p. 59, 60.)

The commissioners commenced examination and classification in the Helena district during the year 1895 and have since continued. The commissioners have examined and classified a portion of the lands described in the complaint. None of them had been classified or examined at the time the taxes were assessed. Of the lands classified by the commissioners up to the date of the stipulation of facts about twenty per cent have been determined to be mineral. The larger part of the land has not been examined and classified. A few of the lands were involved in contests between the Company and mineral claimants pending before the Interior Department. None of the contests had been decided when the taxes were assessed. Some of them had been decided when the facts were stipulated and the balance were still undetermined and pending. (Transcript, 60 to 64.)

In the year 1894 the assessor of Jefferson county, Montana, the appellee's predecessor in office, assessed the lands described in the complaint in the manner and form required by the Montana law, and the assessment roll is included in the record marked Exhibit "X" attached to the stipulation of facts and printed in this court under the title "Stipulation and Addition to Record." The Assessment roll is in the following form:

Railroad Co., Northern Pacific, St. Paul, Minn.

Description.	Sec.	Town. N.	Range. E.	Area. Acres.	Val.
N. W. ¼ and lots 1, 2, 5,	5	1	1	268.88	537

(Transcript, p. 65, 67, and "Stipulation and Addition to Record.")

ASSIGNMENT OF ERRORS.

The errors are assigned in the record (Transcript, p. 86, 87.) The assignments may be summed up under two propositions:

1. *The lands in question were not subject to assessment or taxation under the laws of Montana in the year 1895.*

2. *The particular assessment here complained of was at least illegal and should be enjoined.*

ARGUMENT.

The question for decision is not whether the Railway Company has any interest in its grant, or in the lands in question, which may be subjected to some form of taxation; but whether the *lands themselves* are taxable: whether the present assessment which is on the lands themselves can be sustained. We may well concede that the taxing power is broad enough to reach in some form the interest of the Railway Company in its grant. That interest becomes confessedly a vested interest upon construction of the road. It then becomes property and may well be held subject to someform of taxation.

But here the legislature authorizes a tax upon, and the assessor makes an assessment upon, the land itself by specific description: the whole legal title to each parcel being specifically and separately assessed. When the plain fact is, that neither the assessor, or the Railway Company can place its hand on a single specific parcel and say whether it belongs to the company or to the United States.

The assessment is justified by the assertion that the grant is one *in praesenti:* a misleading expression. The grant is as much *in praesenti* before the public surveys as after; yet it is universally admitted that the lands are not taxable before survey. So the grant is one *in praesenti* before the road is built: yet the lands could not be taxed. A present grant giving a right to earn or receive land might be taxable as property before the road was built, or after it was built before the surveys. But the inquiry before us is, whether any specific land is identified before patent as coming under the grant, so that the company has a complete legal or equitable title to that particular land which brings the land itself under the taxing power.

When we say that a grant is in present words and operates as of its date, it is not meant that the specific sections which will pass under the grant are ascertained. All that is meant is that whatever shall be determined to pass under the grant passes as of its date, usually by relation. As this court well said of the grant in question in *St. Paul & Pacific Railroad Co.* vs. *Northern Pacific Railroad Co.*, 139 U. S. 1. 5

> "As seen by the terms of the third section of the act the grant is one *in praesenti:* that is it purports to pass a present title to the lands designated by the alternate sections, subject to such exceptions and reservations as may arise from sale, grant, pre-emptiom, or other disposition previous to the time the definite route of the road is fixed * * * * The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one *in praesenti;* that is to say it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the road."

So this court said in the case of *Barden* vs. *Northern Pacific Railroad Company*, 154 U. S. 288, 313-316;

> "It is also true that the grant was one *in*

praesenti of lands to be afterwards located. From the immense territory from which the sections were to be taken, it could not be known where they would fall until the line of the road was established; then the grant attached to them, subject to certain specified exceptions; that is, the sections, or parts of sections, which had been previously granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, were excepted, and the title of its other sections or parts of sections attached as of the date of the grant so as to cut off intervening claimants. In that sense the grant was a present one. But it was still, as such grant, subject to the exception of mineral lands made at its date or then excluded therefrom by conditions annexed. Whatever the location of the sections, and whatever the exceptions then arising, there remained that original exception declared in the creation of the grant * * * * The cases cited in support of the claim of the plaintiff only show that the identification of the sections granted and of the exceptions therefrom of parcels of land previously disposed of, leaves the title of the remaining sections or parts thereof, to attach as of the date of the grant, but has absolutely no other effect. Such is the purport, and the sole purport of the cases of *St. Paul and Pacific Railroad Company* vs. *Northern Pacific Company*, 139 U. S. 1, 5, and *Deseret Salt Company* vs. *Tarpey*, 142 U. S. 241, 247, cited by the plaintiff * * * After the plaintiff had complied with all the conditions of the grant, performed every duty respecting it, and among other things that of definitely fixing the line of the route, its grant was still limited to odd sections which were not mineral at the time of the grant, and also to those which were not reserved, sold granted, or otherwise appropriated, and were free from pre-emption and other claims or rights at the time the line of the road was definitely fixed, and was coupled with the condition that all mineral lands were excluded from its operation, and that, in lieu thereof, a like quantity of unoccupied and unappropriated, agricultural lands, in odd sections, nearest to the line of the road, might be selected.

There is, in our judgment, a fundamental mistake made by the plaintiff in the consideration of

> the grant. Mineral lands were not conveyed, but by the grant itself and the subsequent resolution of Congress cited were specifically reserved to the United States and excepted from the operations of the grant."

Applied to lands not granted at all it is absurd to call the grant one *in praesenti*. It cannot be successfully contended that the grant passes a title to mineral land, subject to be devested by subsequent discovery of mineral. By the plain terms of the act mineral land is not "granted." It is excepted and "excluded from the operations of this act." Mineral lands are no more granted than are even sections, or lands outside the lateral limits of the grant.

The question here is not whether the Railway Company may not have *some* right, or some "possessory claim" which may be taxed; but whether the status of the particular sections in question is so determined before patent that they can be said to belong to the company; whether it can be said that the company owns these particular sections and not the United States. Such part of the lands as are mineral belongs to the United States and will never pass under the grant. It cannot be disputed that a large proportion of the lands is mineral, and what proportion, or what lands, is absolutely incapable of determination until the Government of the United States determines the question according to the acts of Congress. That time has not yet arrived, and as to any piece of land involved in this suit it could not be determined when the assessment was made and, as to most of it, cannot now be determined whether it is mineral or non-mineral; whether it belongs to the United States or will come to the Railway Company.

The company has no power to make this determination. The record is conclusive that the company and its receivers have done everything within their power to secure the determination and to speed it. The sole right to make such determination, and to find the facts which are preliminary and essential to such decision, is in the United States; and the United States has the sole do-

minion over said lands for the time being until those lands, which are agricultural and which belong to the company, are segregated from the mass.

The case of *Barden* vs. *Northern Pacific Railroad Company*, 154 U. S. 288, opinion of the court, pp. 313 and 314, settles not only that mineral lands are excluded from the operation of the grant and do not pass, but that any land upon which mineral is discovered prior to the patent is excluded from the grant, and that the patent is necessary to identify what lands are within the grant and what outside of it. Until such identification the lands constitute a mass, partly belonging to the United States, partly to come eventually to the Railroad Company, but what particular lands belong to the United States and what will come to the Railroad Company cannot be determined. So long as this condition continues the government has not parted with possession of and dominion over the lands; they are still essentially government lands and are not subject to taxation. They are analogous as to taxability to uncertified indemnity lands, which a railway company may have a vested right to receive, but which are not taxable until identified and patented, and fall fairly within the principles decided in *Wisconsin Central Railroad Company* vs. *Price County*, 133 U. S. 496; *Northern Pacific Railroad Company* vs. *Traill County*, 115 U. S. 600.

Until determination of the character of the land and patent the Railroad Company is excluded by law from possession of, or dominion over it. It cannot sell and make good title to an acre; it cannot cut the timber upon it; it cannot raise crops upon it; it cannot make any valuable use of it. The lands in question lie in a mineral country and there is no doubt that a large proportion of the lands assessed will never come to the company. Neither the tax officer nor the Company can determine which are mineral and which are not. Both legally and for all practical purposes the Company has no title.

The proposition that while in this condition the lands were not taxable is not new. It was distinctly stated by Mr. Justice Brewer in the dissenting opinion

in the Barden case (concurred in by Mr. Justice Gray and Mr. Justice Shiras), on p. 340;

> "By the rule now laid down, the title to no one of these twenty sections passes to the company, because it is not known absolutely which are mineral lands. So far as known, none may be mineral, and yet, as in this case before us, six years after that line of definite location an exploration develops the fact of minerals, and then it was declared that the title did not pass. When you simply say, as the court does in this opinion, that out of those twenty sections there shall pass the title to such lands as shall thereafter be found or be determined by the Secretary of the Interior to be non-mineral lands, you say in effect that there is no identification of a single tract."

Again on page 347:

> "Again, it is abundantly well settled that lands the title to which remain in the government are not subject to taxation. Can it be that Congress contemplated that the territories and states which should be organized along the line of this transcontinental highway should not be able to tax any alternate sections within the place limits of this grant until such time as it should appropriate money for an exploration as to their character? * * * * Will it be said that Congress intended that the Northern Pacific should pay the taxes on all the lands so situated, taking the chances in the future of some of them proving to be non-mineral? Would such injustice be imputed to Congress, even as against a corporation? Suppose the Northern Pacific did not pay and some party purchased the land at a tax sale; has he lost his money because the land now proves to be mineral lands, and, therefore, still the property of the government? Or, if the State is under obligation to refund the money thus improperly collected in the way of taxes, what then results? The State or County has regulated its tax levy and its expenditures upon the supposition that these lands were subject to taxation. If the title has not passed from the government they are not taxable and a new burden must be cast upon the property of individuals within the territorial limits to make good the unexpected deficiency of public funds."

Here is a distinct statement, if we understand it, made by the three dissenting judges in the Barden case, that under the opinion of the majority of the court the lands were not subject to taxation by the various states until the mineral lands were segregated and the agricultural lands in some way identified. There is nothing in the opinion of the majority of the court from which it can be inferred that the court was not agreed upon this proposition. On the contrary it would appear from the opinion of the court that the full legal title to the lands was not subject to such taxation, as would by sale thereunder pass the land itself, the court drawing the very distinction we insist on by saying, p. 324-5;

> "So also it is said that the States and Territories through which the road passes would not be able to *tax the property of the company, unless they could tax the whole property, minerals as well as lands.* We do not see why not. *The authority to tax the property granted to the company did not give authority to tax the minerals which were not granted. The property could be appraised without including any consideration of the minerals. The value of the property excluding the minerals could be as well estimated as its value including them. The property could be taxed for its value to the extent of the title which is of the land.*"

But since the *Barden* case the court has decided the case of *Central Pacific Railroad Company* vs. *Nevada*, 162 U. S. 512, and this decision is the principal reliance of the learned Attorney General, for the proposition that lands are taxable. It becomes necessary to analyze that case somewhat closely. When this is done we are confident it will appear that this case and the Nevada case are broadly distinguishable from each other. In the Nevada case the statute provided (Sec. 1088) that it should be the duty of the assessor to prepare a roll stating "all real estate, including the ownership, or claim to, or possession of, or right of possession, to any land," etc. The form of the assessment in that case is given in Mr. Peckham's brief and shows an assessment of the company's possessory claim to a certain number of acres of land. The Nevada statute provided for the taxation of the two separate interests in real estate, viz: (a) the

whole estate under the description "real estate," and (b) a less estate or interest under the description "possessory claim."

Turning to the Montana statutes and the assessment made thereunder, the distinction between this tax and the one passed upon in *Central Pacific Railroad Company* vs. *Nevada* is made apparent. The Montana statute will be found in laws of Montana, Second Session 1891, p. 75. The law contains the following sections which are pertinent to the inquiry:

Sec. 4. First. The term "*property*" includes moneys, credits, bonds, stock, franchises, and all other matters and things, real, personal and mixed, capable of private ownership * * * *

Second. The term "real estate" as used in this act, includes all mineral and agricultural land of every description, upon which final proof and payment have been made.

Sec. 5. All taxable property must be assessed at its full cash value. Land and the improvements thereon must be separately assessed.

Sec. 12. * * * * Land must be assessed in parcels or sub-divisions not exceeding six hundred and forty acres each, and tracts of land containing more than six hundred and forty acres, which have been sectionized by the United States Government, must be assessed by sections or fractions of sections.

The assessor must set aside one line in the assessment book for the description of each six hundred and forty acres of land or less—the number of acres to be entered in one column, the description in another column, value in another column, value of improvements in another column, and the total in the total column.

Sec. 14, sub-division 5, referring to statement under oath to be made by tax payer:

"An exact description of all lands in parcels or sub-divisions, not exceeding six hundred and forty acres each, and the sections and fractional sections of all tracts of lands containing more than six hundred and forty acres which have been sectionized by the United States government."

Sec. 34, providing the form of the assessment book, sub-division 2.

"Land, by township, range, section or fractional section; and when such land is not a United States land division or subdivision, by metes and bounds, or other description sufficient to identify it, giving an estimate of the number of acres (not exceeding in each and every tract 640 acres), locality and the improvements thereon.

Sec. 83. "Every tax due upon real property is a lien against the property assessed; and every tax due upon improvements upon real estate assessed to other than the owner of the real estate is a lien upon the improvements; which several liens attach as of the first Monday of February of each year."

The assessment roll printed in "Stipulation and Additions to Record" purports to be an assessment upon specific and distinct land, not upon the mere right, title or interest, or upon the possessory or other claim of the Northern Pacific Railroad Company. The stipualtion of facts which constitutes the record in this case says: "That in the year 1894 the assessor of Jefferson County, Montana, proceeded to and did assess the *lands described in the complaint* herein in the manner and form prescribed by law, and included *said lands* in the assessment book of said county of Jefferson for said year."

Unlike the statute of Nevada, the statute of Montana contains no provision for the assessment of possessory or other claims, but every provision of the statute looks to the assessment of the land itself. Unlike the assessment roll in the Nevada case, the assessment roll here shows an assessment on the land itself, not upon the right, title, interest or claim of the Railroad Company only.

It will thus be seen that the Nevada case involved a taxation of the company's interest in its grant, whatever that interest might be, while in this case the assessment is against distinct parcels of land as such. That case came to this Court on writ of error from the highest court in Nevada, and the state court had held that the interest of the company was such an interest as was included under the assessment of "possessory claim." The Railroad Company argued that its interest was not a "possessory claim," but this court said (p. 522)

that this was not a federal question; that the state court having held that the statute of the state and the assessment included such a claim as the company had in its unpatented grant, that decision was binding on the federal court and no federal question was thereby raised.

In answer to the argument based on the mineral character of part of the lands the court said (p. 525):

> "But, if the Railroad has a possessory claim to these lands, they are taxable under the statute of Nevada, and it is this and this only which the state has assumed to tax."

This sentence quoted from the opinion points the distinction clearly. If land is government land and a state chooses to tax the possessory interest of John Smith therein, we do not see that any valid objection could be made to such an assessment. All that would pass by sale thereunder would be the interest of John Smith; such interest as he might have; and the title of the land would not be clouded by the sale. Such an assessment does not pretend to affect the title. But on the other hand it is equally clear and well settled that the taxation by the state of government *land* is inoperative and void. Such a tax must be valid, or void when assessed: it cannot be held valid, or void depending on some future event. But if valid when assessed it will carry a good title to mineral land—that is to the land of the United States.

This distinction explains the language of the court on page 526 of the *Nevada case* in which it speaks of the grant as a grant *in praesenti* of lands to be afterwards located. What the court meant was that the grant was taxable; the right of the company to receive lands was taxable; the claim of the company was taxable; and that was all which the state of Nevada had assumed to tax. Here the taxation is of the lands themselves while they are in a conglomerate mass, within the dominion and control of the government, with the exclusive right in the government to make the segregation and before that segregation is made and the essential facts necessary to segregation have been determined.

If this argument were otherwise doubtful, it is much

strengthened when the act of February 26, 1895, is considered in connection with it. It being necessary and the government having reserved the right to segregate the mineral from the non-mineral lands falling within the general limits of the grant, Congress had an undoubted right to pass any legislation, or take any action, for the purpose of defining what lands were in fact agricultural belonging to the Railroad Company. With this in view Congress passed the act in question. The act established courts in the land district of Bozeman, Helena and Missoula, in Montana, and the Coeur d'Alene district in Idaho. These courts were authorized to examine the lands within the Northern Pacific limits in these districts, take the testimony of witnesses and receive other evidence relating to the character thereof, summon witnesses and administer oaths; to classify the lands as mineral or non-mineral by legal subdivisions. Their decisions are subject to appeal and are final when approved by the Secretary of the Interior. The Railroad Company under section 7 is to receive patents for such land only, as is so determined to be non-mineral and no patents can issue before such determination.

The United States by this act distinctly asserted its right to the possession of these lands as government lands pending their segregation. It took possession of them and established its own tribunal with jurisdiction to make the separation, and directed patents to the Railroad Company of agricultural lands, *only* as and when the classification was completed.

Therefore the situation when these taxes were assessed was this: the government had granted to the Railroad Company certain lands out of a larger mass belonging to the government, the power to select and segregate the granted lands out of the whole mass being reserved to the United States. Suppose A grants to B all the land fit for agriculture in a certain section, A reserving the exclusive right to determine for himself what lands in that section are fit for agriculture. Now, in this condition, the title to no particular land is vested in B; B has a vested right to receive some land. This right may

be the subject of taxation in some form, but no specific land is vested in B. We submit it is a clear proposition that neither the section nor any specific acre in it can be taxed as the land of B. The situation is, in principle, precisely like the right of the Railroad Company to receive indemnity lands before the selections and patents are made. Such indemnity lands were held not to be taxable in the case of *Wisconsin Central Railroad Company* vs. *Price County*, above cited.

The Northern Pacific Campany desires to pay all the taxes to which it is justly subject, but consider the equity of putting the company in a position where it must, in order to protect what will some day belong to it, pay taxes on a large amount of land to which it will never obtain title; such taxes when paid could not be recovered back. Can it be said that Congress intended the Northern Pacific to pay taxes on all these lands pending their segregation, in order to protect that part of them, which are decided eventually to be agricultural? Will such injustice be imputed to Congress? Is it to be supposed that Congress intended to cloud the title of such lands as should turn out to be mineral by tax titles and tax deeds, or that the state and county should regulate their tax levies and expenditures, upon the supposition that these lands are subject to taxation, and then have it turn out that a large proportion of the taxation is void? As it cannot now be determined which of the lands are agricultural, the company clearly must, if the lands are taxable, pay upon all. This leaves the company to assume all the risk, leads to unnecessary expense on the part of the state, to the clouding of the title of the lands, to such uncertainty of title as may for years prevent their occupation and improvement, and to a multiplicity of suits. This is clearly a sufficient ground for injunction.

The decisions are numerous which point the distinction we have endeavored to make between the taxation of the *land* and taxation of some person's interest therein or claim thereto.

People vs. *Crockett*, 33 Cal. 150, was a case where

Teodora Soto was granted three square leagues of land by the Mexican government, to be selected by the *grantee* and her assigns out of a tract, which was shown to contain more land than the amount granted. The case was one where the grantee had a complete equitable title and the land was held to be taxable, Currey, C. J., dissenting. The statute of California is quoted on page 155.

> "The term, 'real estate,' whenever used in this act, shall be deemed and taken to mean and include, and it is hereby declared to mean and include, the ownership of or claim to * * * any land within the state * * * and the claim by * * * any person * * * to any land, shall be listed under the head of real estate."

In *People* vs. *Shearer*, 30 Cal. 655, the court held in regard to the public domain of the United States, that the land itself is clearly not taxable; but that where the land is in actual occupation and enjoyment of any person, as for instance under a pre-emption, the interest of the possessor is taxable, the possession being a species of property.

In *People* vs. *Cohen*, 31 Cal. 210, the assessment was upon "claim to and possession of 609 acres of land in Suscol Valley, described as follows." The land was public land, but the court held that the assessment in question, not covering the land itself, but only the defendant's claim and right of possession, was valid.

State vs. *Central Pacific Railway Company*, 25 Pac. Rep. 442, decided by the Supreme Court of Nevada, involved a taxation of unsurveyed lands. The assessment was of all the odd-section of land "as their designation will appear when the surveys of the government are extended over them." This was held not to be an assessment of a possessory interest or claim under the Nevada statute and void.

In *State* vs. *Central Pacific Railroad Company*, Supreme Court of Nevada, 30 Pac. Rep. 686, the court drew very clearly the distinction between taxation of a claim or interest in real estate and taxation of the land itself. With reference to the assessment in that case the court said:

> "It will be noticed that it is only the possessory claim to this land that is assessed. Whatever may be the meaning of this term 'possessory claim' * * * it is evident that the thing attempted to be taxed is something less than the fee. * * * Against such an assessment, whatever may be said of its validity otherwise, no objection could ever have been made upon the ground that it was an attempt to subject the property of the United States to taxation. Nothing but the defendant's interest in the land can be reached by such an assessment. It cannot possibly affect the government title or lien any more than a voluntary sale by the defendant would do so."

The learned Circuit Court of Appeals says in its opinion, "There is no averment, however, in. the bill that any of such lands are mineral lands," And the court follows this statement with the quotation of a portion of paragraph III of the bill, shown on page 4 of the printed transcript, to the effect that the surveyors reported the lands to be agricultural and so far as the plaintiff had information no minerals had yet been discovered in said lands. In the statement that the bill does not aver any of said lands to be mineral the court was mistaken; the quotation from the bill is only a portion of the averments on that subject. The following averment of the bill seems to have escaped the attention of the court:

> "And your orators believe and aver that some portions of the lands described in the schedule hereunto annexed will, when examined and classified as provided for in said act of Congress, be held and determined to be mineral lands, and excluded from the grant to said Northern Pacific Railroad Company, and that some of said lands will be held and determined to be agricultural lands, and to be within the grant to said company, but your orators do not know and cannot show unto your honors what specific lands will be so classified and determined to be mineral lands, and your orators further show that pending the classification of said lands as provided for in said bill your orators have refused, and are refusing, to sell or dispose of said lands or any thereof. That until such examination and classification is completed and made final your

orators cannot ascertain or know what part of said lands are granted, and what part thereof are mineral lands and excluded from said grant to said Northern Pacific Railroad Company." (Transcript pp. 7 and 8.)

The fact when the bill was filed was that none of the lands had been classified as mineral or non-mineral by the Mineral Land Commission. But the stipulation of facts shows (Transcript p. 60-64) that prior to the submission of the case in the Circuit Court, the Mineral Land Commission had classified a considerable portion as mineral, another considerable portion as non-mineral and had not yet concluded its labors, the remainder of the lands remaining unclassified. At that date about twenty per cent. of the lands passed upon had been found to be mineral and to belong to the United States. If this assessment is valid how can the conclusion be avoided that sale under it will pass title to the mineral lands?

C. W. BUNN,
Of Counsel for Appellant.

No. 214.

Supreme Court of

Filed Oct.

THE NORTHERN PA
WAY COMP

v.

WILLIAM V. MYERS,
JEFFERSON COUNTY,

Appeal from the Uni
of Appeals for

REPLY BRIEF

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Britton, ... of the United States. ... Appellant.

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ACIFIC RAIL-
PANY,
APPELLANT,

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T, MONTANA.

No. 214.

nited States Circuit Court
r the Ninth Circuit.

FOR APPELLANT.

A. T. BRITTON,
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HINGTON, D. C.:
PRINTERS AND BOOKBINDERS.
1898.

Supreme Court of the United States.

OCTOBER TERM 1898.

THE NORTH PACIFIC RAILWAY COMPANY,
APPELLANT,
v.
WILLIAM V. MYERS, TREASURER OF JEFFERSON COUNTY, MONTANA.

No. 214.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR APPELLANT.

The brief for appellee somewhat misapprehends and therefore confuses the argument of appellant.

The Act admitting Montana, approved February 22, 1889 (25 Stats. 676), provides in Section 4, among the binding ordinances to be incorporated in the Constitution thereof, (*inter alia*) as follows:

"That no taxes shall be imposed by the States on lands "or property therein belonging to or which may hereafter "be purchased by the United States or reserved for its "use."

The Constitution of the State of Montana therefore exempts "the property of the United States" from taxation; and the question here involved is whether certain specific subdivisions of land are so the property of the United States as *not* to be subject to taxation, or are so the property of the Railroad Company as to be subject to taxation. The lands are concededly within the geographical limits of the grant of Congress to the railroad appellant; but mineral lands are in terms *excluded* from said grant, and Congress has created a special Executive tribunal to classify, within a prescribed time, the mineral lands within said geographical limits, and has provided:

"That no patent or other evidence of title shall be issued or delivered to said Northern Pacific Railroad Company for any land in said land district, until said land shall have been examined and classified as non-mineral, as provided for in this Act, and such patent or other evidence of title shall only issue then to such land, if any, in said Land District as said Company may be by law and compliance therewith, and by the said classification, entitled thereto, *and any* patent certificate or record of selection, or other evidence of title or right to possession of any land in said Land Districts, issued, entered or delivered to said Northern Pacific Railroad Company in violation of the provisions of this Act shall be void."

Act, Feb'y 26, 1895 (28 Stats. 683).

This specific tribunal to classify is in the active exercise of its jurisdiction over these lands, some of which they have determined to be mineral, but much the greater part of which they have not yet examined and classified. The time fixed by Congress for such classification has not yet expired.

The appellant upon this state of facts contends that, as mineral lands never pass under the grant, and as the

statutory determination as to which of these lands are mineral is still in process of adjudication by a tribunal of exclusive jurisdiction (the acquisition of title by the railroad being in the meanwhile prohibited), such *lands*, as distinguished from a mere claim to land or possessory right thereto, are not subject to the taxation herein complained of.

Against this contention appellee argues in effect, that the grant to appellant is in *præsenti*, and is made certain as to particular tracts by definite location; that as appellant exercises ownership so as to mortgage and so as to maintain ejectment, its title is subject to taxation; that whilst Executive classification of such lands is conclusive, in absence of fraud, yet that judicial determination of their mineral or non-mineral character would be controlling as to their taxability, and that the uncertainty arising from the undetermined character of the lands affords no relief from taxation.

In reply to appellee it is respectfully submitted:

1. Definite location is merely a method of identification. So also is official classification, such as the Act of February 26, 1895, prescribes. Definite location gives precision upon the earth's surface to the particular subdivisions falling within the geographical limits of the grant. Classification gives precision to the *character* of lands granted or excluded therefrom, whether mineral or non-mineral. All odd-numbered sections of public lands within the prescribed limits, except mineral, are granted, but with reserved right of disposition by the United States until definite location, but mineral lands are *not* granted, and the question of final determination thereof was left by the decision of this Court in Bardon case, 154 U. S. 288, and under the terms of fhe grant, until issue of patent, and by the Act of Congress of February

26, 1895 (in exercise of the reserved right of Congress to "alter, amend, or repeal" the grant), to the determination of a special Executive tribunal thereby created.

Now lands, whose general locus has been fixed by definite location, and as to whose subjection to the grant in all other respects there is no question, are not subject to taxation by the State, if unsurveyed. That is so because it cannot be absolutely determined until survey whether they are odd or even numbered sections. Why does not the same exemption from taxation obtain, if, as to lands excluded by character from the grant, that character has not been determined, though in process of determination by a tribunal of exclusive jurisdiction? In either case, is not the precision or identification of the thing granted so essentially lacking as to take them as specific subdivisions of *land* outside of such an ownership as to be the subject of local taxation? Especially so, when the statute reserving exclusive authority to determine character of land, and to thus identify the sections or the parts of sections granted, prohibits evidence of title to the railroad, and declares that any title given anterior to final classification shall be null and void.

2. It is no sufficient answer to say, that the railroad exercises acts of dominion over these lands by mortgage, and by ejectment suits; and that as the State aids it in securing peaceful enjoyment and possession, the Railroad should cheerfully bear its proportional burden of that taxation.

The railroad undoubtedly had an undetermined claim to these lands, and that claim was the lawful subject of mortgage and of ejectment proceedings. If the State law had provided for taxation of the possessory right or the claim of the Railroad, there could have been no valid objection to such exercise of taxing power.

The State law might perhaps have taxed the whole grant within its limits as an entirety, and that might have been sustained as in effect a tax upon the *claim* to the whole grant. But when the State law imposes the tax upon specific subdivisions, not as possessory rights or as claims, but as *lands*, and those lands have not yet been determined by the proper tribunal to be the property of the railroad, and its right to any evidence of title has been expressly suspended by the grantor, the case assumes an entirely different aspect. For illustration: mineral locations not entered or patented under the United States mining Statute, are mere possessory claims. They are, however, the lawful subject of inheritance or sale, or other incidents of ownership as against all the world, except the United States. As such possessory claims, they and the improvements thereon are taxable. But that does not permit taxation of the mining ground, *as land*, and any such attempted exercise of the taxing power of the State or any sale thereunder would be void.

The uncertainty arising from the undetermined mineral character of the land and the unexecuted and exclusive jurisdiction of a special tribunal to make such determination should control this alleged power of taxation of specific subdivisions *as land*. The State can enact proper laws for the taxing of the claim or possessory right of the railroad company; and that would better promote just and fair result, because the question of the value of such *claim* would then be the necessary basis for taxation. The Railroad Company would not therefore under proper law escape its due proportion of taxation. But when the State goes further and taxes *land* in the indeterminate condition as to title of the tracts here in controversy, it should be restrained by equity. It is not sound argument to urge, as the State does, that the taxing power should be exer-

cised, because if the land proves to be mineral the tax is void and no one is hurt. It is better to say that if the lands are mineral they should not have been taxed at all, and hence, that until their mineral character is settled, in the way prescribed by statute, the taxing power should not be exercised. No sound exercise of legal power can be justly put upon an obvious injustice. It cannot be denied that the imposition of this tax puts the Railroad Company between "Scylla and Charybdis." If they pay and lands are subsequently determined to be mineral, the Company has an utterly inadequate remedy for the recovery of the money paid, if, indeed, it has any remedy. If it does not pay, and lands are subsequently classified as agricultural, all cla m or title thereto has been sold away beyond possibility of recovery.

This principle is directly recognized and enforced by the State in the identical lists in controversy, because repeated subdivisions are returned therein without valuation, and in lieu thereof the tracts are marked as "in contest.' (Supplement to Record, pages 2–10.) This list shows twenty-five separate instances of this character.

If then the State exempts from taxation lands claimed by the Company, simply because such tracts are in contest between the Company and individuals, the principle which she thus concedes must be applied with far stronger reason where the United States, as grantor, has by statutory enactment challenged the character of all odd-numbered sections within the mineral region or belt covered by the classification act, and in the exercise of undoubted power has set on foot special and exclusive Executive machinery to determine tract by tract what lands therein are mineral in fact, and thus remain the property of the United States, because never granted to the Company, and

what lands are in fact agricultural, and hence fall within the railroad grant. In other words, if the State recognizes and enforces exemption of lands originally granted to the railroad, but subsequently *claimed* to be *excepted* therefrom by reason of sales or filings after grant and prior to location under the reserved power of disposition by the grantor, how much stronger would the right of exemption be in the case of lands whose inclusion in the grant at all was being contested by the grantor?

In *Ankeney* v. *Clark*, 148 *U. S.* 358, this Court held, as to this same land grant, that

"If we are right in the conclusion, that the defendant's "title to the land in dispute was imperfect, and subject "to be defeated by the United States in asserting their "right to be paid the costs of survey, it is not necessary "to consider whether the defendant made a proper ten- "der of a deed of conveyance, or whether the deed was in "the form called for by the contract, or whether the plain- "tiff waived a tender of the deed."

If the mere possibility that title under the railroad grant *might* fail through failure to refund to the United States surveying expenses was sufficient to defeat a contract for a title to a tract of land actually granted, then *a fortiori* why is not a title, which by subsequent decision of a court of exclusive jurisdiction might prove never to have been granted, sufficiently indeterminate to be exempt from taxation as land?

Respectfully submitted.

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No. 214.

214.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

Brief of Nolan for Appellee

SUPREME COURT

Filed Oct. 10, 1898.

.... OF ....

THE UNITED STATES.

THE NORTHERN PACIFIC RAILWAY COMPANY,

Appellant.

Versus

WILLIAM V. MEYERS, TREASURER OF JEFFERSON COUNTY,

Appellee.

BRIEF OF APPELLEE.

C. B. NOLAN,
Attorney General of Montana, for Appellee.

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SUPREME COURT

OF

THE UNITED STATES.

E NORTHERN PACIFIC RAILROAD COMPANY,

Appellant.

vs.

LLIAM V. MYERS,

Appellee.

BRIEF OF APPELLEE.

STATEMENT OF FACTS.

This action was brought by the Receivers of the Northern Pa-
Railroad Company to enjoin the sale of certain l
l thereon by the County of Jefferson, Montana.

The lands having been assessed for the year 1894, the Receivers
e Northern Pacific Railroad Company appear
ty Board of Equalization at its regular July meeting, and
l to have the lands stricken from the assessme
were not taxable for that year. The applicati
lenied, and taxes were levied on the lands amo
thousand dollars. These taxes so levied rem
ppellee (the officer authorized by law to sell l
t taxes) advertised the lands for sale. The rece
sking that such sale be enjoined. To this bill a
posed. The demurrer was argued and over-r
nt (the appellee) answered, and issue having

replication and the facts having been stipulated, the court entered a decree adjudging that the lands were not subject to taxation, and enjoined the threatened sale thereof. From this decree the defendant appealed to the Circuit Court of Appeals of the Ninth Circuit, and consequent upon this appeal a reversal of the judgment of the Circuit Court was ordered, and from this judgment of reversal made and entered by the Circuit Court of Appeals the Northern Pacific Railroad Company has taken this appeal.

The stipulation of facts sets forth that the lands in question are surveyed odd sections within, the place limits of the grant to the Northern Pacific Railroad Company by act of Congress approved July the 2d, 1864. (13th Statutes, 365.) That the Railroad Company accepted the terms, conditions and impositions of this Act in due and regular form. That long prior to the assessment and tax levies complained of it prepared in the form prescribed by the Secretary of the Interior, and filed with the Register and Receiver of the district in which the lands were situate, lists of lands claimed by the Company as inuring to it under its grant, including, among others, the land described in the bill of complaint, and at said time paid the Register and Receiver of the United States Land Office the fees to which they were, by reason of such finding and listing, entitled. That the lists were certified to, allowed and approved by the Register and Receiver of the local land office. That these lists, including the lands described in the complaint, had not at the time of the assessment and tax levies complained of, been adjusted in the office of the Commissioner of the General Land Office. That the various divisions in the Commissioner's office had not examined or passed upon said lists, and it has not yet been determined in said office what lands are within the terms of the grant to said Company. That none of said described lands have been certified by the Commissioner to the Secretary of the Interior, or have been patented by the United States to the Railroad Company. That the question whether said lands are mineral or non-mineral in character has not yet been determined, and that this fact is now under investigation under the terms and provisions of the Act of Congress approved Feb. the 26th, 1895, entitled, "An Act to Provide for the Examination and Classification of certain Mineral Lands in the States of Montana and Idaho." (28th Statutes, 683.) That the Railroad Company has such right, title, interest and property in and to said lands as is conferred upon it by the Act of Congress approved July the 2d, 1864, and acts and joint resolutions of Congress supplementary thereto and amendatory thereof, and no other. That the

delay, if any, in the identification of the lands is not the result of any action, failure or default on the part of the Railroad Company. That on November 4th, 1895, the Secretary of the Interior suspended the patenting of the lands until the mineral or non-mineral character of the lands selected by the Company shall have been investigated and definitely ascertained and adjudicated by proper proceedings, and until mineral claimants and the State of Montana shall have opportunity to be heard before the Department on questions of law and fact. That under the Act of February the 26th, 1895, three Commissioners have been appointed to examine and classify the mineral lands in the Helena Land District, including the lands described in the complaint. That the Commissioners thus appointed commenced the examination and classification of the lands in said district during the year 1895, and have since continued such examination and classification, and have examined and classified only a small portion of the lands described in the bill of complaint.

It is conceded that mortgages covering this land have been executed by the Northern Pacific Railroad Company, and that the lands were assessed to the Northern Pacific Railroad Company.

The only question presented for determination is whether those lands under the laws of Montana and the laws of the United States are subject to taxation.

POINTS AND AUTHORITIES.

The sections of the constitution and laws of Montana which affect the question involved are as follows:

Section 1, Article 12, of the Constitution, "The necessary revenue for the support and maintenance of the State shall be provided by the Legislative Assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article."

Section 2, same Article. "The property of the United States, the State, counties, cities, towns, school districts, municipal corporations, and public libraries shall be exempt from taxation; and such other property as may be used exclusively for agricultural and horticultural societies, for educational purposes, places for actual religious worship, hospitals and places of burial not used or held for private or corporate profit, and institutions of purely public charity may be exempt from taxation."

Section 16, same Article. "All property shall be assessed in the manner prescribed by law except as is otherwise provided in this Constitution."

Section 17, same Article. "The word property as used in this article is hereby declared to include moneys, credits, bonds, stocks,

franchises and all matters and things (real, personal and mixed), capable of private ownership."

Section 18, same Article. "The Legislative Assembly shall pass all laws, necessary to carry on the provisions of this article."

Section 13, Second Session Laws of Montana, 1891. "The Assessor must, between the first Monday of March and the second Monday of July in each year, ascertain the names of all taxable inhabitants and all property in his county subject to taxation, except such as is required to be assessed by the State Board of Equalization, and must assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was at 12 o'clock M. on the first Monday of March next preceding."

Section 14. "He must require from each person a statement, under oath, setting forth specifically all the real and personal property owned by such person, or in his possession, or under his control, at 12 o'clock M. on the first Monday in March. Such statement must be in writing, showing separately: 1. All property belonging to, or in the possession, or under the control or management of such person."

Section 34. "The Assessor must, under the direction of the State Board of Equalization, prepare an assessment book, with appropriate heading, alphabetically arranged, in which must be listed all property within the county, and in which must be specified, in separate columns, under the appropriate head:

1. The name of the person to whom the property is assessed.
2. Land, by township, range, section or fractional section.

Section 60. "The Board of County Commissioners is the Board of Equalization, and must meet on the third Monday of July in each year to examine the assessment book and adjust and equalize the valuation of the taxable property of the county. It must continue in session for that purpose from time to time, until the business of equalization is disposed of, but not later than the second Monday in August."

Section 61. "The Board has power, after giving notice in such manner as it may by rule prescribe, to increase or lower any assessment contained in the assessment book, so as to equalize the valuation of the property contained therein and make the assessment conform to the valuation of such property. Said Board of County Commissioners is vested with full power to make any changes in the valuation of property, whether such change relates to an entire class or to particular items of property, real or personal, and they shall make such changes as will result in a fair valuation of property within the meaning of this act: Provided, however, That nothing in this section contained shall confer authority upon said Board to change or alter in any way any assessment made by the State Board of Equalization of any railroad, or the property of the same, or of any person."

Section 62. "No reduction must be made in the valuation of property unless the party affected thereby, or his agent, makes and files with the Board a written application therefor, verified by his oath, showing the facts upon which it is claimed such reduction should be made."

Has The Northern Pacific Railroad Company a Taxable Interest in the Lands Within the Place Limits Under the Laws of Montana and the Laws of the United States?

The nature and character of this land grant has been so repeatedly before the court that extended reference thereto is needless. Repeated adjudications unvarying in their trend hold that the grant is one *in praesenti*, and that the title to the land vested in the Railroad Company upon the filing of the map of definite location of the road.

Railroad Co. vs. Smith, 9 Wall., 95.
Schulenberg vs. Harriman, 21 Wall., 44.
Leavenworth L. & G. R. Co. vs. U. S., 92 U. S., 733.
Missouri, Kansas & T. R. R. Co. vs. Kansas P. R. Co., 97 U. S., 491.
Railroad Co. vs. Baldwin, 103 U. S., 426.
Wright vs. Rosebury, 121 U. S., 488.
Wisconsin Central Co. vs. Price Co., 133 U. S., 496.
St. Paul M. & M. Co. vs. Phelps, 137 U. S., 528.
St. Paul P. R. Co. vs. Northern Pacific R. R. Co., 139 U. S., 1.
Deseret Salt Co. vs. Tarpey, 142 U. S., 241.
United States vs. Southern Pacific R. Co., 146 U. S., 570.
Missouri, Kansas & Texas R. Co. vs. Cook, 163 U. S., 491.

The Act of Congress granting this land to the Railroad Company operated as a conveyance of it. The vesting of the title was deferred until the filing of the map of definite location of the road, and when this was done the legal title to the lands within the place limits vested in the grantee.

Deseret Salt Co. vs. Tarpey, 142 U. S., 241, and cases above cited.

The Railroad Company has received title to its lands by virtue of an Act of Congress. An Act of Congress making a direct grant of lands is better evidence of title than a patent.

Grignon's Lessee vs. Astor et al., 2 How., 319.
Langdeau vs. Haines, 21 Wall., 521.

The position which the Railroad Company seeks to maintain with reference to those lands is not tenable. It practically is the owner of the lands for all purposes except as to taxation. It has placed mortgages upon the lands within the place limits, and can

maintain actions in ejectment for the recovery of the possession of specific portions of the same.

Northern Pacific R. Co. vs. Hussey, 61 Fed., 231.
Deseret Salt Co. vs. Tarpey, 142 U. S., 241.

In resisting the payment of taxes on those lands within the place limits, it is urged that until the Interior Department adjudges what lands are mineral and what lands are not mineral, it is impossible for the Railroad Company to determine what portions of this land will be patented to it. In its bill of complaint it expressly avers that this land is reported to be agricultural, and that it cannot be profitably operated as mineral land.

If the Railroad Company can succeed in having legal process issued to enjoin the collection of the tax, then it has an interest in the lands which under the laws of Montana is the subject of taxation. If it has no interest in the land, it has no standing in court to enjoin the sale of the lands.

"It is argued that the opinion in effect decides that under the statute, the State of Montana has a right to assess and levy taxes upon the lands of the United States, and that if no application is made to the Board of Equalization, the sale of such public lands cannot be restrained. The plaintiff, however, in no respect represented the United States,, and an injunction cannot be granted to private individuals to avert the sale for taxes of the property of others, whether exempt from taxation or not."

Northern Pacific R. R. Co. vs. Patterson, 154 U. S., 130.

"The sale for taxes is made on the presumption that the purchase from the government has been *bona fide* and if not so made the purchaser at a tax sale acquires no title and consequently no embarrassment can arise in future disposition of the same land by the government."

Carroll vs. Safford, 13 How., 462.

It will be seen that the Railroad Company has no standing in court by its own admissions. If the land is mineral, title never passed to the Railroad Company or never can pass, as it is expressly reserved from the grant. If the land is not mineral the legal title absoluetly vested in the Railroad Company at the time of the definite location of the road, and the land is undoubtedly subject to taxation.

It will be noticed that when the application was made to the County Board of Equalization to strike the list of lands from the assessment roll, it was not because that the lands were mineral. As has been already observed, actions can be successfully maintained

by the Railroad Company affecting the possessory title to the land. In the determination of those actions the question of the mineral character of the lands must of necessity arise, and the rights of the litigants are determined through proofs adduced upon the trial. It might be asked, why should not proofs of a like character be admissible where the attempt is made to collect taxes? If such proof is admissible in the one case affecting the right of the Railroad Company to regain possession of a specific portion of the land within the place limits, it ought to be equally admissible for the purpose of determining whether land within the place limits is subject to taxation .

In the case of Davis vs.Wiebbold, 139 U. S., 507, it was held that where two parties had obtained patents to the same piece of ground, evidence could be introduced to show that the land was not mineral at the time of the application for a patent, and that it was not mineral at the time of the trial.

In the case of Mining Co. vs. Campbell, 135 U. S., 286, it was held that where each party had a patent from the government, and the question as to the superiority of the title under these patents depended upon intrinsic facts not shown by the patents themselves, it was competent in any judicial proceeding to establish it by proof of the facts.

See also Railroad Co. vs. Smith, 9 Wall., 95.

The legal title to the land not mineral is vested in the Railroad Company. The issuance of the patent conveys no additional rights, so that there is no disposition of public domain in the issuance of the patents to lands within the place limits. It is true that the determination of the character of the land as to being mineral, made by the Interior Department, in the absence of fraud is exclusive. Though this is so it is respectfully urged that as affecting the taxibility of the lands a judicial determination of their character as to being mineral or not would be controlling.

There was no unwillingness on the part of the Railroad Company to pay taxes upon lands within the place limits until the decision in the Barden case was made, and until the passage by Congress of the Act of February the 26th, 1895, *supra.* It is now insisted that by reason of the decision referred to no title to any specific land has been secured within the place limits.

Before the decision in the Barden case there had been more or less discussion as to whether or not the Railroad grants excluded mineral lands which at the time of the passage of the Act were not known to be mineral. The question was set at rest by the decision in this case. Mr. Justice Field, speaking for the court, said:

"It seems to us as plain as language can make it that the intention of Congress was to exclude from the grant actual mineral lands, whether known or unknown, and not merely such as were at the time known to be mineral."

It was contended that the construction which was given to the Act by the court would prevent the States and Territories from taxing the property of the Company unless they could tax the whole property, mineral as well as agricultural lands. In reply to this contention the court said:

"We do not see why not. The authority to tax the property granted to the Company did not give authority to tax the minerals which were not granted. The property could be appraised without incurring any consideration of the minerals."

In the case of the Northern Pacific Railroad Company vs. Patterson, 154 U. S., 132, which involved the question of the taxability of those lands, the court said:

"The ground upon which it was asserted that these lands were not subject to taxation was that they had not been identified as lands passing to the plaintiff under its grant, because the United States had refused to certify them, and held them suspended "for the reason that it is claimed that such lands are mineral and are excepted from the grant to the plaintiff." It was said in Wisconsin Central Railroad vs. Price, 133 U. S., that 'he who has the right to property, and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of state taxation,' and plaintiff does not state whether all or any part of the lands are mineral or non-mineral. If the legal or equitable title to the lands or any of them was in the palintiff, then it was liable for the taxes on all or some of them, and the mere fact that the title might be in controversy would not appear in itself to furnish sufficient reason why plaintiff should not determine whether the lands or some of them were worth paying taxes on or not."

It is true that the latter case was disposed of upon other grounds, but the language of the court is indicative of its views upon the question of the taxability of the lands within the place limits. It might be remarked in this connection that the court, when this language was employed, had in mind the consequences of the decision in the Barden case, and had in mind the hardships which were suggested upon the presentation of the case in the event that it should be adjudged that the Railroad Company secured no title to mineral lands. The Barden case was argued on the 11th of April, 1894, and decided on the succeeding 26th of May. The Patterson case was argued on May the 12th and decided on the same day in which the Barden case was decided.

Does the Uncertainty Arising From the Determination of the Character of the Lands Relieve Them From Taxation?

It is respectfully insisted that this court has answered in the negative in the case of Railway Co. vs. McShane, 22 Wall., 445.

The act of July the 1st, 1862, creating the Union Pacific Railway Co., enacted Section 3, as follows:

"There is hereby granted to the said Company, for the purpose of aiding in the construction of said railroad, and to secure the safe and speedy transportation of the nation's troops, munitions of war and public stores thereon, every alternate section of public land designated by odd numbers to the amount of five alternate sections per mile on each side of said railroad on the line thereof, and within the limit of ten miles on such road, not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached istelf at the time the line of such road is definitely fixed; and all such land so granted which shall not be sold or disposed of by said Company within three years after the entire road shall have been completed shall be subject to settlement and pre-emption like other lands at a price not exceeding one dollar and twenty-five cents per acre to be paid to said Company."

It was held that this contingency of settlement and pre-emption was too remote and indefinite to relieve from taxation the lands thus granted to the company.

The question of the taxation of lands granted to aid in the construction of railroads was first considered by this court in the case of Railway Company vs. Prescott, 16 Wall., 603.

It was next considered in the case of Railway Co. vs. McShane, *supra.*

It was next considered in the case of Northern Pacific Railroad Company vs. Traill County, 115 U. S., 610. It was no doubt the language employed in that case that induced Congressional action providing for the taxation of those lands. Justice Miller, expressing the views of the court, spoke as follows:

"We are aware of the use being made of this principle by the companies, who, having earned the lands, neglect to pay these costs in order to prevent taxation. The remedy lies with Congress and is of easy application. If that body will take steps to enforce its lien for these costs of survey, by sale of the lands or by forfeiture of title, the Treasury of the United States would soon be reimbursed for its expenses in making the survey, and the States and Territo-

ries, in which the lands lay, be remitted to their appropriate rights of taxation. The courts can do no more than declare the law as it exists."

This decision was made in December, 1885, and on the succeeding July Congress passed the Act already referred to, which provided expressly for the taxation of lands granted to railroad corporations by act of Congress, which Act was in full force and effect at the time of the assessment of the lands whose sale is enjoined.

In Central Pacific Railway Co. vs. Nevada, 162 U. S., 512, the court, considering the taxation of these lands, used the following language:

"It is further claimed that no lands granted to this road can be taxed prior to the issue of the patent, because the grant excludes mineral lands; not only minerals but mineral lands; that the right and power to ascertain which of thes lands are mineral and which non-mineral is vested exclusively in the officers of the government, and can be proved only by the issue of a patent, as held by this court in *Barden vs. Railroad*, 154 U. S., 288. It is argued that if the railroad company paid taxes upon these lands, it might never own or acquire them, and the tax would consequently be paid on property it never owned or could own; and that, upon the other hand, if the company should not pay the taxes, and the lands be sold under the judgment appealed from, the title to the lands, if the assessment were valid, would pass to the purchaser whether they were mineral or not....It is true that in the *Barden case* we held that mineral lands were excluded from the operation of the Northern Pacific Railroad land grants, whether such mineral lands were known or unknown at the date of the grant, because the statutes had excepted them in the most unequivocal terms; but nothing was said in that case to impugn the authority of previous cases which had held that these grants were *in praesenti* of lands to be afterwards located. They became so located when they were surveyed. "Then the grants attached to them, subject to certain specified exceptions, "one of which was that minerals should be discovered upon them before the issue of a patent, when as to such lands the title of the company failed. The possibility, however, that minerals might be discovered upon certain sections of these lands, as to which the title of the railway company might be defeasible, would not impair their title to the great bulk of the grant, or enable the company with respect thereto to evade its just obligations to the State."

In the light of these declarations it is respectfully insisted that the taxability of those lands within the place limits is no longer an open question. It is possible that the uncertainty which arises by reason of the exclusion of mineral lands from the grant would affect the value of the property rights the Railroad Company has in the lands within the place limits. Undoubtedly the County Board of Equalization, if application were made, would consider that feature

of the case in the light of the appraised value made by the proper officer for taxation purposes. No complaint of this kind was made; the request was addressed to the Board to strike them off the taxable list of the country. That the Board acted correctly in its refusal to do so in the light of the possessory and proprietary interest of the Railroad Company in the lands in question we most emphatically urge.

Northern Pacific R. R. Co. vs. Traill Co., 115 U. S., 600.
Wisconsin Central R. R. Co. vs. Price Co., 133 U. S., 496.
Northern Pacific R. R. Co. vs. Walker, 47 Fed., 681.
Northern Pacific R. R. Co. vs. Wright, 51 Fed., 68.
Ib. 54 Fed., 67.
Myers vs. Northern Pacific R. R. Co., 83 Fed., 358.
Northern Pacific Railroad Co. vs. Patterson, 154 U. S., 130.
Barden vs. Northern Pacific R. R. Co., 154 U. S., 288.
Central Pacific Railway Co.vs. Nevada, 162 U. S., 512.
State vs. Central Pacific Railway Co., 20 Nevada, 373.
State vs. Central Pacific Railway Co., 21 Nevada, 258.

The taxing power of the State is never presumed to be relinquished, and it exists unless the intention to relinquish is declared in clear and unambiguous terms admitting of no other reasonable construction. This is a canon which has been promulgated by this court in numberless decisions. The Constitution of the State of Montana in clear and unmistakable language provides for the taxation of all property except such as is expressly exempted. The property of the United States is expressly exempted, but the interest which the conceded facts show are vested in the Railroad Company to lands within the place limits are not exempted. The acts of the Legislative Assembly of the State of Montana in equally clear and explicit terms provide for the taxation of such interests. The Railroad Company is in the possession and enjoyment of this land, constituting an immense domain within the territorial limits of the State of Montana. It invokes the aid of the State in securing it in the peaceful possession and enjoyment of this domain, and it is respectfully urged that it accords with equity and justice that it should bear a proportionate share of the burdens of taxation to maintain the government of the State.

Respectfully submitted,

C. B. NOLAN,
Attorney General of the State of Montana,
For Appellee.

NORTHERN PACIFIC RAILWAY COMPANY *v.* MYERS.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 214. Argued October 21, 1898. — Decided January 23, 1899.

This bill was filed to enjoin the enforcement of a tax imposed under the laws of Montana, upon lands granted by Congress by the act of July 2, 1864, c. 217, to the Northern Pacific Railroad Company, and acquired by the appellant on the reorganization of the company. There was a controversy as to the character of the lands taxed — whether mineral or non-mineral. The lands have never been patented or certified to the company; the company claimed that it had only a potential interest therein; and the relief sought was that the lands be adjudged not subject to such assessment and taxation until the issue of patents therefor by the United States. It was stipulated in the court below that the sole

Statement of the Case.

question desired to be submitted was, whether the lands described in the bill were subject to taxation under the laws of the United States and of the State of Montana. That court sustained the taxation. In this court the position of the company was stated by its counsel as follows: "The question for decision is not whether the railway company has any interest in its grant, or in the lands in question, which may be subjected to some form of taxation; but whether the *lands themselves* are taxable: whether the present assessment which is on the lands themselves can be sustained. We may well concede that the taxing power is broad enough to reach in some form the interest of the railway company in its grant. That interest becomes confessedly a vested interest upon construction of the road. It then becomes property and may well be held subject to some form of taxation. But here the legislature authorizes a tax upon, and the assessor makes an assessment upon, the land itself by specific description: the whole legal title to each parcel being specifically and separately assessed. When the plain fact is, that neither the assessor, or the railway company can place its hand on a single specific parcel and say whether it belongs to the company or to the United States." *Held*, that, although the question submitted by stipulation had been somewhat changed in form, the same result must be reached, and the judgment of the court below be affirmed.

This suit involves the validity of a tax levied under the laws of the State of Montana against certain lands lying within the grant to the Northern Pacific Railroad Company, made by the act of Congress, approved July 2, 1864, c. 217. 13 Stat. 365.

It was brought in the Circuit Court of the United States for the District of Montana by the receivers of the Northern Pacific Railroad Company, a Federal corporation, and the receivers were appointed by a decree of the Federal court.

The suit proceeded in the Circuit Court in the name of said receivers to a hearing on demurrer and to a submission of the case upon bill, answer and stipulated facts. On the twelfth of November, 1896, it was stipulated and represented to the court that the Northern Pacific *Railway* Company had purchased the property in question pending the litigation, and it was agreed and thereupon ordered by the court that the Northern Pacific *Railway* Company be substituted as plaintiff in place of the receivers. Thereupon a decree was passed on the sixteenth day of December in favor of the complainant, enjoining the enforcement and collection of the taxes. From this

decree the defendant William Myers, county treasurer, appealed to the Circuit Court of Appeals, which reversed the decree of the Circuit Court. *Myers* v. *Northern Pacific Railway*, 48 U. S. App. 620. The plaintiff railway company takes this appeal.

It was agreed "that the sole question desired to be submitted upon the pleadings, and this stipulation, is whether the lands described in the bill were subject to taxation under the laws of the United States and of the State of Montana." This being the only question submitted, the allegations of the pleadings and statements of the stipulation not bearing on that question need not be stated; and it is sufficient to note that the bill and stipulation showed the incorporation of the Northern Pacific Railroad Company by the act of July 2, 1864; its power to construct a railroad from Lake Superior to Puget Sound; the grant of land to it by section 3, which is quoted hereafter; the performance by the railroad company of all the conditions of the grant, both provisional and final, including the construction of the road and its acceptance by the United States; and the freedom of the lands from preemption claims and rights.

Prior to the attempted assessments and tax levies assailed, the lands were surveyed by the United States or its authority, and were reported by the surveyors making such surveys to be agricultural lands, non-mineral in character; and the company prepared, in the manner prescribed by the Secretary of the Interior, lists of the lands claimed by it under the grant, including the lands in controversy, and filed them in the proper district land office, paying the fees thereon, and attached to each of said lists was an affidavit of the land commissioner of the railroad company, in which it was affirmed "that the foregoing list of lands which I hereby select is a correct list of a portion of the public lands claimed by said Northern Pacific Railroad Company as enuring to the said company" under its grant by the act of Congress of July 2, and a joint resolution approved May 31, 1870, and "that the said lands are vacant, unappropriated, and are not interdicted mineral or reserved lands, and are of the character contemplated by the

grant, being within the limit of forty miles on each side of the line of route for a continuous distance of ——, being a portion of said lands for a section of —— miles of said railroad, commencing at —— and ending at ——."

The said lists were duly filed and their accuracy tested by the district land officers and so certified, and it was also certified that the filing was allowed; that they were surveyed public lands within the limits of the grant, "and that the same are not or is any part thereof returned and denominated as mineral land or lands." It was also certified that no claims were on file against the lands and that the fees were paid.

The lists were transmitted to the office of the Commissioner of the General Land Office.

The stipulation shows the manner of examination in the land office, and "that such lands are not patented or certified to the company until clear lists are approved by the Secretary." And the lists have not yet been examined or passed or patented to the company, and that the mineral or non-mineral character is under investigation under the provisions of the act of Congress of February 26, 1895, c. 131. 28 Stat. 683.

The company has such right, title, interest and property in the lands as was conferred upon it by the act of July, 1864, and the act and joint resolutions amendatory thereof, and acquired by a compliance with their terms.

One Thomas G. Miller, a citizen of Montana, transmitted to the Secretary of the Interior a letter signed by Thomas G. Miller as chairman citizens' executive committee, declaring that the selections of the railroad company embraced thousands of recorded mineral claims and extensive mining properties being prospected, developed and worked, "and in view of the irreparable injury which would be caused to the people and State of Montana by the premature or unlawful conveyance of title to such lands to the railroad company, I beg leave to formally file the following requests:

"That the Commissioner of the General Land Office be directed to suspend the patenting of lands in Montana to the Northern Pacific R. R. Company until the mineral or non-

mineral character of the lands selected by said company shall have been investigated and definitely ascertained and adjudicated by proper proceedings and until mineral claimants and the State of Montana shall have opportunity to be heard before the department on questions of law and fact.

"2. That the Commissioner be directed to cause to be noted on the lists of the company's selections the tracts and townships alleged to be mineral in character by affidavits now on file in the Department of the Interior.

"Very respectfully,

"THOMAS G. MILLER,

"*Chairman Citizens' Executive Committee.*"

November 4, 1889, the Secretary of the Interior referred said letter to the Commissioner of the General Land Office, with the following indorsement: "Referred to Commissioner of Gen'l Land Office, with approval of within requests and direction to comply thereunto. Please notify me when done. Nov. 4, '89. J. W. Noble, Sec'y."

This order was not revoked prior to 1895.

The company and its receivers have been diligent to prosecute the identification of the lands, and the defendant, conceding this, denies that they have not been or are not fully defined and identified as part of the grant to the company.

Three commissioners were appointed as provided in the act of February 26, 1895, and commenced the examination and classification of said lands during the year 1895, and have classified certain of the lands as mineral, a list of which is inserted, and that the remainder of the lands have not been examined and classified. And it was admitted that other lands, a list of which is given, are in contest in the Interior Department, and that a certain section of land was decided in 1894, but subsequent to the assessment, to be mineral, and excepted from the grant, and that there were other lands to which there were claims, but which were disputed by the company, and that some contests were decided in favor of the company.

In the year 1894 the assessor of Jefferson County, Montana,

proceeded to and did assess the lands described in the complaint herein, in the manner and form prescribed by law, and described and included said lands in the assessment book of said county of Jefferson for said year.

The receivers appeared before the board of equalization and objected to the assessment, and the board refused to strike the lands from the assessment roll, and the taxes were assessed and levied against the lands with the other lands of the county; that the tax proceedings were in manner and form in all respects as required by the laws of Montana; that the taxes amounted to $3000, and that the treasurer of the county was proceeding to collect the same by sale and would so collect the same if not enjoined and restrained by the order of the court.

As a ground o relief by injunction the bill alleges: "And your orators show that said tax levies cloud the title to said described lands and impair the value thereof as an asset in the hands of your orators; that said certificates and deeds when issued, as your orators believe and show they will be, will constitute further clouds upon the title thereto. That if said lands be sold a multiplicity of suits will be necessary to quiet the title thereto and to remove the clouds thereby created."

Among the things which were asked to be adjudged at the final hearing were:

"1. That the lands described in Schedule 'A' hereunto annexed, and each and all thereof, were not subject to assessment and taxation by said county of Jefferson or State of Montana for the year 1894, and until the United States shall issue to said railroad company patents therefor.

"2. That it may be ordered, adjudged and decreed that said pretended and attempted assessments and tax levies were and are null and void, and constitute a cloud upon the title to said described lands."

Section three of the act of July 2, 1864, is as follows:

"That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and

telegraph line to the Pacific Coast, . . . every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preemption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied, by homestead settlers, or preëmpted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. . . . Provided, further, that all mineral lands be, and the same are hereby, excluded from the operation in this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road, may be selected as above provided; and further provided, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal."

Section four provides for the issuing of patents on the completion and acceptance of each twenty-five consecutive miles of said railroad and telegraph line.

The assignment of errors is as follows:

"The said court held that the lands described in the bill of complaint in said action were subject to taxation, although it appears from the pleadings and stipulation in said cause:

"(*a.*) That said lands were at the time of the assessments and tax levies complained of unpatented, and were involved in contests pending before the Interior Department over questions of fact between said railway company and various settlers and the United States.

"(*b.*) Although it further appears from the pleadings and stipulation in said cause that said lands were not at the time of the assessment and tax levies complained of, identified and defined as lands passing under the act of Congress approved July 2, 1864, so as to be segregated from the public lands of the United States.

"(*c.*) Although it further appears from the pleadings and stipulations in said cause that the grantee, under the act of Congress approved July 2, 1864, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route,' was not entitled to patents for said lands at the time of the assessment and tax levies complained of.

"(*d.*) Although it appears from the pleadings and stipulation in said cause that the United States possessed at the time of the assessment and tax levies complained of an interest in said lands, and each and all thereof, and that the said lands were subject to exploration for minerals as public lands of the United States.

"The said court failed and refused to hold that the lands described in the complaint were not at the time of the assessment and tax levy complained of subject to assessment or taxation.

"The said court entered an order reversing the decree of the United States Circuit Court for the District of Montana, and remanded said cause with an order to the United States Circuit Court for the District of Montana to enter a decree in favor of the above-named appellant."

Mr. C. W. Bunn and *Mr. A. B. Browne* for appellant. *Mr. A. T. Britton* was on their brief.

Mr. C. B. Nolan, Attorney General of the State of Montana, for appellee.

Mr. Justice McKenna, after stating the case, delivered the opinion of the court.

The averments in the bill of complaint and the stipulation

of facts show a controversy between the railroad company and the Interior Department as to the character of the lands, whether mineral or non-mineral, taxed by the State of Montana, and the company avers "that at the time of said attempted assessments and tax levies said lands . . . had not been and are not now certified or patented to said railroad company, and the said lands were not ascertained or determined to be a part of the lands granted to said company, nor were they segregated from the public lands of the United States, and the said railroad company had and has but *a potential interest* therein." And part of the relief prayed for was "that the lands be adjudged not subject to assessment and taxation by said county of Jefferson or by the State of Montana for the year 1894, and until the United States shall issue to said railroad company patents therefor."

A similar claim was denied by the Circuit Court of Appeals for the Ninth Circuit in *Northern Pacific Railroad* v. *Wright*, 7 U. S. App. 502, and by this court in *Central Pacific Railroad* v. *Nevada*, 162 U. S. 512. It is, however, now conceded that the railroad has a taxable interest, counsel for appellant saying:

"The question for decision is not whether the railway company has any interest in its grant, or in the lands in question, which may be subjected to some form of taxation; but whether the *lands themselves* are taxable; whether the present assessment which is on the lands themselves can be sustained. We may well concede that the taxing power is broad enough to reach in some form the interest of the railway company in its grant; that interest becomes confessedly a vested interest upon construction of the road. It then becomes property, and may well be held subject to some form of taxation.

"But here the legislature authorizes a tax upon, and the assessor makes an assessment upon, the land itself by specific description; the whole legal title to each parcel being specifically and separately assessed. When the plain fact is, that neither the assessor or the railway company can place its hand on a single specific parcel and say whether it belongs to the company or to the United States."

The question which was submitted therefore by the stipulation, namely, "whether the lands described in the bill were subject to taxation under the laws of the United States and of the State of Montana," if not evaded by the concession of appellant, has changed its form; but even in the new form it seems to have the same foundation as the contention rejected in the *Nevada case*, *supra*, that because title may not attach to some of the lands it does not attach as to any. Whether it has such foundation we will consider.

In *Railway Company* v. *Prescott*, 16 Wall. 603; *Railway Company* v. *McShane*, 22 Wall. 444, and *Northern Pacific Railroad Company* v. *Traill County*, 115 U. S. 600, it was decided that lands sold by the United States might be taxed before they had parted with the legal title by issuing a patent; but this principle, it was said, must be understood to be applicable only to cases where the right to the patent was complete, and the equitable title was fully vested in the party without anything more to be paid or any act to be done going to the foundation of his right. In the first case the court said two acts remained to be done which might wholly defeat the right to the patent: (1) the payment of the cost of surveying; (2) a right of preëmption which would accrue if the company did not dispose of the lands within a certain time. The dependency of the right of taxation on the first condition was affirmed with the principle announced in *Railway Company* v. *McShane*. The dependency of the right of taxation on the second ground was expressly overruled.

Embarrassment to the title of the United States by a sale of the land for taxes seems to have been the concern and basis of those cases. This embarrassment was relieved, and Congress permitted taxation by the act of July 10, 1886, c. 764, 24 Stat. 143. By that act it is provided: "That no lands granted to any railroad corporation by any act of Congress shall be exempt from taxation by States, Territories and municipal corporations on account of the lien of the United States upon the same for the costs of surveying, selecting and conveying the same, or because no patent has been issued therefor; but this provision shall not apply to lands unsurveyed: *Provided*,

That any such land sold for taxes shall be taken by the purchaser subject to the lien for costs of surveying, selecting and conveying, to be paid in such manner by the purchaser as the Secretary of the Interior may by rule provide, and to all liens of the United States, all mortgages of the United States and all rights of the United States in respect to such lands: *Provided further*, That this act shall apply only to lands situated opposite to and coterminous with completed portions of said roads and in organized counties: *Provided further*, That at any sale of lands under the provisions of this act the United States may become the preferred purchaser, and in such case the land sold shall be restored to the public domain and disposed of as provided by the laws relating thereto."

This act was interpreted in *Central Pacific Railroad Co.* v. *Nevada*, *supra*. The lands involved were classified in the opinion as follows: (1) those patented; (2) those unsurveyed; (3) those surveyed but unpatented, upon which the cost of surveying had been paid; and (4) like lands upon which the cost of survey had not been paid. Applying the statute, Mr. Justice Brown, speaking for the court, said: "The principal dispute is with regard to the fourth class. . . . In view of the statute, it is difficult to see how these lands, which are the very ones provided for by the statute, can escape taxation if the State chooses to tax them."

This case establishes that the State may tax the surveyed lands, mineral or agricultural, within the place limits of the grant, and there is nothing in the case nor its principle which limits the assessment to an interest less than the title; that distinguishes the lands from a claim to them. The statute of Nevada defined the term "real estate" to include "the ownership of, or claim to, or possession of, or right of possession to any lands;" and the Supreme Court of the State had decided that to constitute a possessory claim actual possession was necessary, and, on this account, distinguished in some way surveyed from unsurveyed lands. It was urged that the distinction was not justified, and that the necessity of actual possession applied alike to both kinds and exempted both kinds from taxation, and hence it was insisted there was nothing to

tax unless the title was taxed, and that this could not be done under the decisions of this court. To this contention the opinion replied that how the interest of the railroad should be defined was not a Federal question, nor did inaptitude of definition by the Supreme Court of the State or in the application of the definition raise a Federal question. "Taxation of the lands by the State," it was said, "rested upon some theory that the railroad had a taxable interest in them. What that interest was does not concern us so long as it appears that, so far as Congress is concerned, express authority was given to tax the lands."

If this case leaves us any concern it is only to inquire what assessable interest passed by the grant. It is not necessary to detail the cases in which this court has held that railroad land grants are *in præsenti* of land to be afterwards located. Their principle reached the fullest effect and application in *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241, 316, in which it was held that the legal title passed by such grants as distinguished from merely equitable interests, and an action of ejectment was sustained by a lessee of the Central Pacific Railroad Company before patent was issued. But in *Barden* v. *Northern Pacific Railroad*, 154 U. S. 288, in a similar action recovery was denied to the Northern Pacific Railroad Company on the ground that mineral lands were not conveyed by the grant to it, but were "specifically reserved to the United States and excepted from the operations of the grant."

The accommodation of these cases is not difficult. In the *Barden case* there was a concession that the land was mineral, and there was an attempted recovery of valuable ores. In the *Deseret case* there was no such concession, and the primary effect of the grant prevailed. In the case at bar there is no such concession, and the primary effect of the grant must prevail. There is no presumption of law of what kind of lands the grant is composed. Upon its face, therefore, the relation of the railroad to every part of it is the same, and on the authority of *Deseret Salt Co.* v. *Tarpey*, ejectment may be brought for every part of it. The action, of course, may be

defeated, but it may prevail, and a title which may prevail for the company in ejectment surely may be attributed to it for taxation, to be defeated in the latter upon the same proof or concession by which it would be defeated in the former. An averment that there is a controversy about the character of lands not yielded to, an expression of doubt about it not acted on, is not sufficient. This view does not bring the railroad company to an unjust dilemma. The company has the title or nothing. In response to its obligations to the State, it must say which. If it have the title to any of the lands, this title cannot be diminished to a claim, or an interest because it has not or may not have title to others. If there is uncertainty, it must be resolved by the railroad. Suppose, to use the language of counsel, "Neither the assessor or the railway company can place its hand on a single specific parcel and say whether it belongs to the company or to the United States." We nevertheless say again, as we said by the Chief Justice in *Northern Pacific Railroad* v. *Patterson*, 154 U. S. 130, 132, "If the legal or equitable title to the lands or any of them was in the plaintiff, then it was liable for the taxes on all or some of them, and the mere fact that the title might be in controversy would not appear in itself to furnish sufficient reason why the plaintiff should not determine whether the lands or some of them were worth paying taxes on or not."

That the *Barden case* does not preclude state taxation of the lands is also manifest from its expression. Mr. Justice Field, who delivered the opinion of the court, in answer to the contention that its doctrine would have that effect, said: "So also it is said that the States and Territories through which the road passes would not be able to tax the property of the company unless they could tax the whole property, minerals as well as lands. We do not see why not. The authority to tax the property granted to the company did not give authority to tax the minerals which were not granted. The property could be appraised without including any consideration of the minerals. The value of the property, excluding the minerals, could be as well estimated as its value

including them. The property could be taxed for its value of the extent of the title which is of the land."

The averment of the answer is that this was done; that the lands were assessed and taxed for their value as agricultural lands without including the minerals in them. The replication put this in issue but the stipulation of facts does not explicitly notice it, but probably was intended to cover it by the agreement that the assessment was made in the manner and form required by the laws of Montana.

We are referred to the act of Congress of February 26, 1895, c. 131, entitled "An act to provide for the examination and classification of certain mineral lands in the States of Montana and Idaho," 28 Stat. 683, as strengthening the contention of appellants. We do not think it does. It was passed after the time at which the validity of the assessment complained of must be determined. Besides, it does not purport to define the rights of the railway company in any particular with which we are now concerned. It furnishes the Secretary of the Interior with another instrumentality — not bringing the lands to a different judgment, but to an earlier judgment.

Discovering no error in the decree of the Circuit Court of Appeals, it is

Affirmed.

MR. JUSTICE BREWER, MR. JUSTICE SHIRAS, MR. JUSTICE WHITE and MR. JUSTICE PECKHAM dissented.